TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 218

MARY MIELSEN, ADMINISTRATRIX OF THE ESTATE OF OLE A. MIELSEN, DECEASED, AND MARY MIELSEN, IN HER OWN PERSONAL RIGHT, APPELLANTS,

vs.

ROBERT SHEFFIELD AND THE SILVER BELL MINING COMPANY, NOW KNOWN AS AND SUED AS THE SILVER BELL SMELTER COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA.

(28,000)

(22,041.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 218.

MARY NIELSEN, ADMINISTRATRIX OF THE ESTATE OF CARL S. NIELSEN, DECEASED, AND MARY NIELSEN, IN HER OWN PERSONAL RIGHT, APPELLANTS,

vs.

ALBERT STEINFELD AND THE NIELSEN MINING & SMELTING COMPANY, NOW KNOWN AS AND CALLED THE SILVER BELL COPPER COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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1 to 3 In the Supreme Court of the Territory of Arizona.

No. 1088.

ALBERT STEINFELD and THE SILVER BELL COPPER COMPANY, a Corporation, Appellants,

vs.

MARY NIELSEN, Administratrix of the Estate of Carl S. Nielsen, Deceased, and MARY NIELSEN, in Her Own Personal Right, Appellee.

Appeal from the District Court of the First Judicial District of the Territory of Arizona.

Eugene S. Ives, S. L. Pattee, and S. V. McClure, attorneys for Appellants.

Geo. W. Lewis, Wm. H. Sawtelle, Francis M. Hartman, and Edwin F. Jones, attorneys for Appellee.

Be it remembered that on to-wit: the fourteenth day of December, 1908, came the Appellants in the above entitled cause by their attorneys Messrs. Eugene S. Ives, S. L. Pattee and S. V. McClure, and filed in the clerk's office of said court in said entitled cause, a certain Judgment Roll in words and figures following, to-wit:

4 Copies of the original Complaint, Summons, Answer, Amended Complaint, Answer to Amended Complaint, and Second Amended Complaint, which are contained in the Judgment Roll are omitted from the transcript by direction of attorneys for Appellant.

5 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

MARY NIELSEN, Administratrix of the Estate of Carl S. Nielsen, Deceased, and said MARY NIELSEN, in Her Own Personal Right, Plaintiff,

vs.

ALBERT STEINFELD and THE NIELSEN MINING & SMELTING COMPANY, a Corporation, Now Known as and Called the Silver Bell Copper Company, a Corporation, Defendants.

Plaintiff's Third Amended Complaint.

Now comes the plaintiff, Mary Nielsen as administratrix of the estate of Carl S. Nielsen, deceased, and said Mary Nielsen in her own personal right and in her proper person, and by way of
6 amendment to and of their complaint heretofore filed herein against Albert Steinfeld and the Nielsen Mining & Smelting

Company, a corporation, now known as and called the Silver Bell Copper Company, a corporation, by leave of the court duly had hereto, complain and say:

That said Mary Nielsen is the widow and relict of the late Carl S. Nielsen, a duly naturalized citizen of the United States, who departed this life intestate on or about the 5th day of March, 1901, leaving as his sole heirs at law his widow and their four infant children, Hilda D., Gwynne E., Ina W., and Richard H. Nielsen, then aged thirteen, eleven, nine and seven years respectively; that at the time of his death the said Carl S. Nielsen and his said family were residing in Pima county, territory of Arizona, where his family still resides; that on or about the 8th day of June, 1903, said Mary Nielsen was by the Probate Court of Pima county, duly appointed administratrix of the estate of the said Carl S. Nielsen, deceased, and gave bond and qualified as such according to law, and since that time she has acted as such administratrix, and is still acting as such, under the authority of said Probate Court; that the defendant Albert Steinfeld resides at Tucson, in said Pima county; and that the Nielsen Mining & Smelting Company is a corporation organized and existing under and by virtue of the laws of the territory
7 of Arizona, and that the name of such corporation was changed to the Silver Bell Copper Company by resolution of its board of directors made on or about the 14th day of January, 1901, and that since that date and up to the present time said corporation has transacted its business under and by said latter name.

Plaintiffs allege that about the end of the year 1897 said Carl S. Nielsen leased from the defendant, Albert Steinfeld, who then was managing partner of the firm of L. Zeckendorf & Co., a large mercantile concern doing business in the said city of Tucson, Pima county, Arizona, that certain then unpatented mine or mining claim situated in the Silver Bell Mining District, Pima county, Arizona, and known as and called the "Old Boot" mine, which said Steinfeld was then holding in trust for one Julia W. Zeckendorf who was the owner thereof, upon an agreement to the effect that the said Nielsen was to have the privilege of working the said mine and extracting, shipping and selling ores therefrom, upon the payment to said Steinfeld of a royalty of $1.25 per ton upon all ores so extracted and shipped, and upon said Nielsen agreeing to do the annual labor upon said mining claim and upon certain other mining property in the neighborhood owned by said defendant;
8 which said lease was merely a renewal of certain former leases had by said Nielsen upon said mine under which he had previously worked the same; that soon thereafter said Nielsen took charge of said mine and proceeded to work same under said lease with such limited means as he could command, and after he had extracted therefrom, smelted and had ready for shipment to market a large quantity of ore, said Steinfeld proposed to said Nielsen that then and thereafter he ship the product of said mine through said firm of L. Zeckendorf & Co., and have credit with said firm for such supplies as he might need in working said mine, the same to be paid for out of the proceeds of

the product of the mine, which proposition was then accepted by said Nielsen, and then and thereafter all such products were so shipped and all supplies for working said mine were so obtained, and paid out of the proceeds of said product; that the prospects of said mine grew better and better as said Nielsen continued to work the same under said lease, and large quantities of ore were extracted therefrom, smelted and shipped to market, and after said Nielsen had been working said mine under said lease for about one year said Steinfeld proposed to him through one J. N. Curtis, an alleged mining engineer in the employ of said Steinfeld, or of said firm, who had made repeated examinations of said mine for said Steinfeld dur-
9 ing said period, that a corporation be formed to purchase, own and operate said mine, and such other mining properties and claims as it might from time to time acquire by purchase or otherwise, that said Nielsen turn over to said corporation all of his mining assets of every kind, and that said corporation assume and pay all of the liabilities of said Nielsen incurred in working said mine up to that time, that said Nielsen be given thirty per cent of the capital stock of said corporation for the net value of his said assets above said liabilities, same to be fully paid up and non assessable, that said Nielsen be made superintendent of said corporation, and placed in charge of working said mine and the smelter thereat, and that said Curtis then represented to said Nielsen that larger means would be placed at his command for working said mine under said corporation than he then had; that upon consideration of said proposition and representations said Nielsen accepted the same, and thereupon and in pursuance thereof on or about the 14th day of January, 1899, the Nielsen Mining & Smelting Company was duly organized and incorporated under the laws of the territory of Arizona; that the purposes of the said corporation as stated by its charter were:

"Locating, buying, selling, leasing and working mines,
10 mining claims, building and erection of smelting and other reduction plants, buying, selling and reducing ores and metals; also the carrying on of a general merchandise business, keeping boarding houses; also to buy, sell and lease land; to be used in or about the mining business, and to erect buildings thereon; and generally to do anything incident to the business of mining and reducing metals;"

The capital stock of said corporation consisted of one thousand shares of the par value of twenty-five dollars each; its principal place of business was to be in Pima county; its corporate existence was to continue for twenty-five years; its indebtedness was to be limited to twenty-five thousand dollars; its incorporators were Carl S. Nielsen, J. N. Curtis and one R. K. Shelton; its first board of directors were the said Nielsen, Curtis and Shelton, and said Curtis and Shelton were made president and secretary respectively of said corporation, and both of them continued to hold such positions as such officers and directors up to the time when the property of said corporation was sold as hereinafter alleged and the proceeds thereof distributed; that immediately upon the organization of said corporation said Nielsen turned over to it through its proper officers all of

the mining assets of every kind consisting of his smelter, buildings, tools and machinery, ores on the dump, ores, bullion and
11 matte in transit, all outstanding accounts for ores, bullion and matte theretofore shipped and not accounted for, and his said lease, and said corporation then assumed the payment of said Nielsen's liabilities incurred in and about the operation of said mine and smelter, and issued to him an order for three hundred shares of the capital stock of said corporation, same to be fully paid up and non-assessable, and a certificate therefor to be delivered to him when same could be issued; then said Nielsen was made superintendent of said corporation and placed in charge of the working of said mine and smelter, subject, however, to the control of the said Curtis, who as president of said corporation was general manager of the same; that soon after the formation of said corporation said Old Boot mine was purchased by same through said Steinfeld who held same as trustee as aforesaid, at the price of $25,000, of which sum $2,500.00 was paid in cash, and the residue thereof was to be paid in equal installments of $2,500.00 each every three months thereafter; that said Neilsen operated said mine and smelter for about one year as such superintendent, and during all of that time the prospects of said mine continued to improve and grow better, and large quantities of valuable ores were extracted therefrom, smelted, and the products thereof shipped to market, through the firm of L. Zeckendorf & Co., who by agreement with
12 said corporation were to have the shipping of the products of said mine and the collection of the proceeds thereof, and from whom all money, goods and supplies to be used in the working of said mine and smelter were to be and were obtained, which were to be paid for out of said proceeds; and that on or about the first day of February, 1900, said Steinfeld, although he was neither a director nor an officer of said corporation, undertook to discharge the said Neilsen from his position as superintendent of said Company, and Neilsen refused to be discharged by him, and thereupon said Steinfeld ordered said mine and smelter to be shut down, and all work thereat stopped as soon as the then present supply of coke thereat should be exhausted, and about the same time said Steinfeld caused said Neilsen to be informed that he had been discharged as such superintendent by order of the board of directors theretofore made, which was false, and said supply of coke having been exhausted, and said Neilsen being powerless to resist the said Steinfeld, who as managing partner of the said firm of L. Zeckendorf & Co., from whom all moneys, goods and supplies for working said mine and smelter had to be obtained held the purse strings of said corporation, and believing from said representations that he had been regularly discharged as such superintendent by said board
13 of directors, did, on or about the 19th day of February, 1900, shut down said mine and smelter and ceased all work thereat, and relinquished his said position as superintendent; that during the last five or six months said Neilsen was in charge of said mine and smelter as superintendent thereof said Steinfeld kept representing to said Neilsen through said Curtis that said corporation was

getting deeper and deeper into debt to said firm of L. Zeckendorf & Co., on account of the moneys, goods and supplies furnished as aforesaid, and about the time said mine and smelter was shut down he represented to said Neilsen through said Curtis, that said corporation was at the time of such shut-down indebted to said firm in the sum of from $75,000.00 to $85,000.00.

That shortly after such shut-down said Steinfeld proposed to said Neilsen to buy his said 300 shares of stock in said corporation for some nominal price and Neilsen refused so to sell the same, and later on said Steinfeld proposed to purchase said shares of stock for $10,000.00 to be paid out of the proceeds of the sale of said mine when the same should be sold, or worked at a profit, and said Neilsen refused to sell the same, believing said price to be grossly inequitable and inadequate, and thereupon said Steinfeld threatened that if said Neilsen did not accept said terms he would cut
14 him off without one cent for his said shares of stock, and the said Neilsen believing the said representations that said corporation was indebted to the said firm in the said sum of from $75,000.00 to $85,000.00, and knowing that all his means were tied up in said corporation and that he was without means to pay any part of said indebtedness, and believing himself to be at the mercy of the said Steinfeld, and fearing from said threats made by said Steinfeld that he would get nothing at all for said shares of stock if he refused to accept Steinfeld's said offer, he, the said Neilsen and his wife, the said Mary Neilsen, were, by said representations and threats, driven, defrauded and coerced into signing their names unto a certain pretended option or agreement for the sale of said shares of said stock, which pretended option or agreement bears date of the 29th day of June, 1900, and is in the words and figures following:

"This agreement, made the 29th day of June, 1900, between Albert Steinfeld and the Neilsen Mining & Smelting Company, a corporation organized under the laws of the territory of Arizona, parties of the first part, and Carl S. Neilsen and Mary Neilsen, his wife, parties of the second part, witnesseth:

That said parties of the first part in consideration of the
15 transfer by said Carl S. Neilsen to Albert Steinfeld of three hundred shares of the capital stock of the Nielsen Mining & Smelting Company, and in consideration of the parties of the second part executing their deed of quitclaim and release of their interest in and to certain mining claims as fully appear from certain quitclaim deed executed by said parties of the second part and one L. B. Lewis, to said Albert Steinfeld, and in further consideration of the sum of one dollar by said parties of the second part in hand paid to said parties of the first part, receipt whereof is hereby acknowledged, do hereby agree that they will pay unto the said parties of the second part, the sum of ten thousand dollars ($10,000.00) lawful money of the United States, as soon as the said Neilsen Mining & Smelting Company will consummate a sale of its mining properties, which are situated in Silver Bell Mining District, Pima

county, Arizona; such sum to be paid within thirty days after any such sale is completed.

Said parties of the first part further agree that in the event said Neilsen Mining & Smelting Company, should commence active operations that then and in that event, the net profits which may arise to said company from its said working, shipping and operating, shall be applied, first, to the payment of the debts of said company, second, after said debts are paid, said net profits up to the amount of
16 $10,000 shall be paid to the said party of the second part; and upon the full payment of the said sum of $10,000.00 out of said profits, the parties of the first part hereto shall be relieved and released from any obligation to pay said parties of the second part a like sum of $10,000 or any part thereof, in the event said company consummates or completes a sale of its properties as hereinbefore agreed; that is to say, in no event shall said parties of the second part be paid more than the sum of $10,000.00.

In witness whereof, the parties hereto have hereunto placed their hands the day and year first above written.

In Triplicate.

ALBERT STEINFELD.
NIELSEN MINING & SMELTING CO.,
By J. N. CURTIS, *President.*
MARY NIELSEN.
CARL S. NIELSEN.

TERRITORY OF ARIZONA,
County of Pima, To wit:

Before me, William F. Cooper, a notary public in and for the county of Pima, territory of Arizona, on this day personally appeared Carl S. Nielsen and Mary Nielsen, wife of said Carl S. Nielsen, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purpose and consideration therein expressed. And
17 the said Mary Nielsen, wife of the said Carl S. Nielsen, having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said Mary Nielsen, acknowledged said instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed and that she did not wish to retract it.

Given under my hand and seal of office, this 29th day of June, A. D. 1900.

WILLIAM F. COOPER,
Notary Public.

My commission expires March 13, 1901."

Which said pretended option or agreement appears to have been acknowledged by said Neilsen before one W. F. Cooper, a notary public, but same does not appear to have been acknowledged by said Steinfeld or the Nielsen Mining & Smelting Company.

That shortly after the shutting down of said mine and smelter, said Steinfeld purchased from the various owners and claimants thereof certain surrounding and neighboring mining claims at merely nominal prices amounting in the agregate to not more than $18,000.00, the titles to some of which he took in his own name, and to the others of which he took in the name of the Mammoth Copper Company, a corporation, which he caused to be
18 formed and incorporated for the express purpose of taking and holding the titles to the same, and in which he was the sole stockholder, and for all of which surrounding mining claims so purchased he afterwards took and received from said Silver Bell Copper Company the full price which he had paid for the same, with interest, and all of his expenses incurred in purchasing said claims.

That on or about the 20th day of May, 1903, said Steinfeld sold all the property of the Silver Bell Copper Company, to the Imperial Copper Company, a corporation, at the price of $515,000.00, and by deed dated on the 20th day of May, 1903, said Steinfeld and said Silver Bell Copper Company and the said Mammoth Copper Company conveyed said property amounting to forty-nine mining claims in all, including said Old Boot mine, to said Imperial Copper Company, which deed is of record in the office of the county recorder of Pima county, in book No. — at page —.

That the said Steinfeld received and collected the proceeds of said sale, to-wit, the sum of $515,000.00, and applied $275,000.00 thereof to his own use, and afterwards, on or about the 20th day of January, 1904, said Steinfeld caused a dividend to be declared by the board of directors of the said Silver Bell Copper Company of $111.00 on each of the one thousand shares of its said
19 capital stock, and thereby a dividend of $33,300.00 was declared upon the three hundred shares of Nielsen stock, and that said Steinfeld drew said dividend of $33,300.00 on said date and applied the same to his own use, and never paid any part thereof to plaintiffs; and that after the declaration and payment of said dividend, and on or about the 23rd day of January, 1904, said Steinfeld paid to the said Mary Nielsen the sum of $10,000.00, as the purchase price of said 300 shares of stock owned by said Carl S. Nielsen under said pretended option or agreement, and that the said Steinfeld kept and applied to his own use all of the residue of the proceeds of said 300 shares of Nielsen stock.

That at or about the time of the execution of the said pretended option or agreement, said Steinfeld took from said Nielsen a pretended assignment or transfer of said 300 shares of stock in said company, and that afterwards said Steinfeld caused a new certificate of stock for said 300 shares to be issued in the name of "Albert Steinfeld, trustee," and plaintiffs allege that the said Steinfeld held said stock in fact, as well as in law, as trustee for the plaintiff, Mary Nielsen, administratrix as aforesaid, and so continues to hold the same; and that the said certificate of stock was so issued to said Steinfeld, as trustee, with the purpose and intent that he
20 should take and hold the same as trustee for plaintiff, the said Mary Nielsen, administratrix, as aforesaid.

And at the same time, to-wit, on the 29th day of June, 1900, the said Steinfeld also required and compelled the said Carl S. Nielsen and Mary Nielsen to sign and deliver to him a written transfer of said three hundred shares of stock in the Nielsen Mining & Smelting Company, and also all their right, title, interest and claim of any kind in and to any of the property or effects of the Nielsen Mining & Smelting Company, which said transfer purports to have been executed in consideration of the sum of one dollar, but plaintiff alleges that no consideration was in fact paid for said conveyance and transfer, and that the same is and was wholly without consideration, and was done solely with the purpose and intent of vesting the legal title to said stock in the said Steinfeld as trustee, to be held by him in trust for the said Carl S. and Mary Nielsen until the said sum of $10,000.00 should be paid to them, and at the same time the said Steinfeld required the said Carl S. Nielsen to endorse in blank the certificate of stock held by the said Nielsen in the said Nielsen Mining & Smelting Company, as hereinbefore alleged, and plaintiff avers that the said endorsement of the certificate of stock by
the said Carl S. Nielsen was wholly without consideration and
21 was likewise made solely for the purpose of vesting the legal
title to said stock in the said Steinfeld as trustee, and plaintiff avers that all of these contracts, transfers and endorsements were made to the said Steinfeld with the distinct purpose and intent that he should not acquire interest in said stock until the whole of said sum of ten thousand dollars was paid, and that the said stock should in fact belong to the said Carl S. and Mary Nielsen until fully paid for, in accordance with the terms and conditions of said pretended contract.

And plaintiff further avers, that neither the said Steinfeld or the said Nielsen Mining & Smelting Company complied with the terms of said agreement made by them on the 29th day of June, 1900, and that the said payment of the sum of ten thousand dollars was not made by them, or either of them, at or within the time provided by said contract, and that the said contract became and was forfeited and of no effect, and the plaintiff became and was entitled to have the stock so transferred to and received by the said Steinfeld, returned to her as administratrix of the estate of said Carl S. Nielsen, together with all and every dividend or payment made thereon by said corporation and received thereon by the said Steinfeld.

And plaintiff further alleges that at various times after the
22 lapse of thirty days from the sale of the property of said Silver
Bell Copper Company to the Imperial Copper Company plaintiff demanded of the said Steinfeld that the said sum of money due on said contract be paid to her, but the said Steinfeld refused and failed to pay the same, and plaintiff alleges that at the time she so demanded payment under said contract she did not know that any dividend had been paid by said company, or received by said Steinfeld, and that the said Steinfeld, though in duty bound to inform her, did not do so, and never informed her that he had received said dividend, or anything of value by reason of the said stock so as above transferred to him, and plaintiff alleges that at

the time she received from said Steinfeld the said sum of ten thousand dollars she had no legal adviser, and was ignorant of the fact of the declaration of said dividend, and believed she was still bound by the said contract of June 29th, 1900. And plaintiff now alleges that she is advised and believes, and so charges, that the said contract was illegal and of no effect, and that the said Steinfeld and the said Nielsen Mining & Smelting Company then had no right to enforce the same, and that at the time she received the said sum of ten thousand dollars she had no right to waive the breach of the said contract, or to waive or release any right or interest in said
23 stock which belonged to the said Carl S. Nielsen, or to do any act which would deprive the estate of said Nielsen, or his heirs, of their right to the return of said stock.

And plaintiff further alleges upon information and belief that the said Nielsen Mining & Smelting Company was without legal power to execute said contract, and that the same was never in fact executed by anyone having authority or right to make said contract, or to bind the said company thereby; that the said company could not, for the consideration set out in said contract use its assests to carry out said contract; that by the terms of said contract no benefit or advantage would pass to the said company, but the same would inure to said Steinfeld individually, and that so far as said company was concerned such contract was without consideration, a nullity, and of no legal effect.

And plaintiff alleges that by reason of the fact that said company could not legally enter into said contract, the said contract is and was wholly ineffectual, and did not and could not give any rights to the said Steinfeld, or impose any duty or obligation upon plaintiff, or the said Carl S. Nielsen.

And plaintiff avers that at the time she received said sum of ten thousand dollars she did not know that said contract was
24 of no validity, and believed that both she and the heirs of the said Carl S. Nielsen were bound thereby.

That some time after said corporation was organized, as hereinbefore alleged, said Steinfeld conceived and put into execution the design of forcing the said Nielsen out of said corporation and acquiring his said 300 shares of stock for a mere pittance of the real value thereof, and that in order to accomplish said purpose and design, the said Steinfeld shut down said mine and smelter and caused the said Nielsen to be discharged as such superintendent, as hereinbefore alleged, and falsely represented to the said Nielsen that the indebtedness of said corporation to said firm of L. Zeckendorf & Co., amounted to from $75,000.00 to $85,000.00, and threatened that if said Nielsen did not accept his offer for said shares of stock that he would cut him off without anything for the value thereof.

Plaintiffs further allege that at the time said Steinfeld made said representations that the indebtedness of said corporation to said firm of L. Zeckendorf & Co., amounting to $75,000.00 to $85,000.00, and that Nielsen had been discharged as superintendent of said corporation by order of its board of directors theretofore

made, he, the said Steinfeld, well knew that said representations were false when he made them, and that he made said
25 representations for the purpose of deceiving the said Nielsen, and for the purpose of acquiring his said shares of stock for a mere pittance of the value thereof; and that the said Steinfeld then well knew that said indebtedness did not exceed the sum of thirty thousand dollars, if it was that much.

And plaintiffs allege that the said Nielsen and his wife, Mary Nielsen, relied upon the said representations of said Steinfeld made as aforesaid, and believed the same to be true, and had no means of finding out the falsity of said representations, for the reason that all the books and accounts of said corporation were kept under the charge and control of the said Steinfeld, and the said Nielsen had no books or accounts, or other means whatsoever, whereby he could ascertain the true amount of such indebtedness.

Plaintiffs allege that about the time said Steinfeld shut down said mine and smelter, discharged the said Nielsen as superintendent, and obtained the said pretended option and agreement from said Nielsen and wife, that the said Steinfeld well knew that the property of said corporation was worth a large sum of money, and was at or about said time, negotiating for the sale of said property with different parties at prices ranging from $150,000.00 to $250,000.00, and that said prices were placed upon said mines by the said
26 Steinfeld, and which facts he concealed from the said Nielsen and wife.

Plaintiffs allege that the said Steinfeld at all the times mentioned and referred to herein dominated and controlled the said corporation and the majority of its board of directors and officers; that he made the said Shelton and Curtis officers and directors of said corporation because they were employees of his and he knew that he could control and use them as he pleased, and that he did use and control them as he pleased. And that by reason of his said domination of said corporation and a majority of said stockholders and directors said Nielsen was powerless to resist when said Steinfeld ordered said mine and smelter shut down as aforesaid, and forced said Nielsen out of his position as such superintendent.

Plaintiffs allege that by reason of his domination and control of said corporation and its affairs, said Steinfeld came to learn of the importance of acquiring the surrounding and neighboring mining claims which were acquired by him as hereinbefore alleged, and that a part of his purpose in shutting down said mine and smelter was to acquire same as cheap as possible, and that he did acquire the same at a very low figure thereby, and that for said reason said Steinfeld became and was in said purchase a trustee for said Silver Bell Copper Company, and so acknowledged him-
27 self to be afterwards, and that he took and received from said company pay for same in full, and that by reason thereof the whole of the proceeds of the sale of said properties to the said Imperial Copper Company, at the price of $515,000.00, as hereinbefore set forth, became and was the property of the said Silver

Bell Copper Company, and that the said 300 shares of stock owned by said Nielsen as aforesaid was entitled to thirty per cent of the net proceeds of said sale, as its just share thereof, to-wit, the sum of one hundred and fifty thousand dollars, or thereabouts.

That of the said one thousand shares of stock of the said corporation, 499 shares thereof were held in the name of L. Zeckendorf & Co., 30 shares thereof were held in the name of Albert Steinfeld, trustee for Julia Zeckendorf, 300 shares thereof were held in the name of Carl S. Nielsen, 170 shares thereof were held in the name of J. N. Curtis and one share thereof was held in the name of R. K. Shelton, but said one share was owned by Albert Steinfeld, and the same was merely placed in the name of said Shelton in order that he might be made a director and officer of said corporation. That neither the said L. Zeckendorf & Co., nor the said Curtis, nor the said Albert Steinfeld, trustee for Julia Zeckendorf, nor the said Shelton, nor the said Steinfeld, ever paid
8 anything whatsoever of value for said shares of stock so owned and held by them, but that the said Nielsen did pay for his shares of stock by turning over to said corporation his said assets, which said assets exceeded his said liabilities so assumed by said corporation, by a considerable sum of money.

That during all the times herein mentioned from the time of the formation of said corporation, said firm of L. Zeckendorf & Co., were, by agreement made by them with said corporation, sole bankers and supply house for said corporation, and that as such bankers and supply house for said corporation, said firm charged said corporation its full rate of profits on all goods and merchandise sold to said corporation, and charged interest on all past due accounts.

Plaintiffs allege that no consideration whatsoever was paid by said Steinfeld, or by said corporation, to said Nielsen by either of them for said shares of stock at the time of the execution of said pretended option or agreement of June 29th, 1900, and that no benefit or advantage whatsoever arose or accured to the said Nielsens, or either of them, either then or afterwards, by reason of the execution of the same, but that the whole of the benefits and advantages arising and accruing therefrom arose and accrued to the said Steinfeld and the said corporation, and that said pretended agreement or option was void for want of consideration.

Plaintiffs allege that the said Nielsen Mining & Smelting Company was not authorized, either by its own charter, or by the laws of the Territory of Arizona, to purchase shares of its own capital stock, and that its attempt to do so was ultra vires and void.

Plaintiffs allege that the said Carl S. Nielsen died without ever having learned of the falsity of the said representations of the said Steinfeld, as to the amount of indebtedness of the said corporation to said firm, and as to said Nielsen having been removed as such superintendent by order of the board of directors of said company, and that the said Mary Nielsen never learned of the falsity of the said representations until within less than one year prior to the institution of this action.

That at the time the said Mary Nielsen took and received the said $10,000.00 from the said Steinfeld, she fully believed that she and the estate of the said Carl S. Nielsen were fully bound by said pretended agreement of June 29th, 1900, and that if she did not accept said sum she and said estate would get absolutely nothing for said 300 shares of stock, and that she was ignorant of her rights in the premises.

Plaintiffs allege that one-half of the said sum of $10,-
30 000.00 was paid to the said Mary Nielsen in her own right, and the other one-half was paid to her as administratrix of the estate of Carl S. Nielsen, deceased, and she is now advised that said shares of stock was community property under the laws of the territory of Arizona, and all the proceeds of the same should have been paid to her in her fiduciary capacity *capacity* as administratrix, and that said Mary Nielsen is made a party to this action in her own individual right to the end that she may be in court to be subject to the order of the court as to the sum of $5,000.00 received by her as aforesaid, in case said sum of $10,000.00 shall be decreed to be refunded to said Steinfeld, or to be credited upon the amount of any judgment rendered in favor of plaintiffs, or either of them; and that plaintiffs are willing to refund said sum of $10,000.00 to said Steinfeld in case the court shall decree the return of said shares of stock to said Mary Nielsen as administratrix aforesaid, or to have the same treated as a credit upon the net amount found by the court to be due to said plaintiff as the proceeds of the said 300 shares of stock.

Plaintiffs allege that said pretended option or agreement of June 29th, 1900, was if valid at all, which plaintiffs most strongly deny, at the most a mere executory contract or option, for the purchase of said shares of stock, and was of no legal force or effect
31 whatsoever, until said consideration of $10,000.00 was paid, which was not done until on or about the 23rd day of January, 1904, and that by reason thereof said sum of $33,300.00 paid to and received by said Steinfeld as dividend on said shares of stock on the 20th day of January, 1904, as aforesaid, was the property of plaintiffs, and should have been paid to the said Mary Nielsen, administratrix as aforesaid, instead of to said Steinfeld, and that by reason thereof said administratrix is entitled to a judgment for the same, with lawful interest thereon from said date.

And plaintiffs allege that during the last three or four months said Nielsen operated said mine and smelter as superintendent of said corporation, the products thereof amounted to about thirty thousand dollars ($30,000.00) per month for each of said months, and that said Nielsen could and would thereby have paid off all of the indebtedness of said corporation in a short time, if he had been permitted by said Steinfeld to do so.

Wherefore, plaintiffs pray that the defendant, Albert Steinfeld, the Nielsen Mining & Smelting Company or the Silver Bell Copper Company, be required by the order of this court to produce for the examination of plaintiffs and their attorneys, and for the pur-
32 pose of making copies thereof if so desired, prior to the time of trial, all books accounts, contracts, agreements, deeds,

assignments, bills of sale, transfers of stock, stock books and stock certificates, receipts and writings of every kind connected with or pertaining to the transactions hereinbefore set forth, and to be relied upon by either party to this action; and to produce the same in court at the trial of this action, to be used as evidence, if desired by plaintiffs.

That said pretended option or agreement of June 29th, 1900, for the sale of said 300 shares of stock, and all contracts, deeds, receipts, assignments, bills of sale and writings of every kind connected therewith, or pertaining thereto, be held and decreed by the court to be null and void.

That a judgment be rendered in favor of Mary Nielsen, administratrix of the estate of Carl S. Nielsen, deceased, against the defendant, Albert Steinfeld, for the net value of the proceeds of said 300 shares of stock less the sum of $10,000.00 paid to said Mary Nielsen as aforesaid, with interest thereon from May 20th, 1903, until paid.

Or that in case the court should hold the said writing of June 29th, 1900, to be valid and binding upon said plaintiff, that then and in that event the court shall render a judgment in favor of
33 the plaintiff for the sum of $33,300.00, with interest thereon from January 20th, 1904, paid to said Steinfeld as a dividend on said 300 shares of stock, and for any other sum which the court may hold should have been declared as such dividend.

And plaintiffs pray for such other general and special relief as to the court may seem proper in the premises, and for their costs in their behalf herein expended.

GEORGE W. LEWIS,
FRANCIS M. HARTMAN,
EDWIN F. JONES,
WM. H. SAWTELLE,
Attorneys for Plaintiffs.

(Duly verified by Mary Nielsen.)
(Filed March 30th, 1908.)

(Title of Cause.)

Answer to Second Amended Complaint.

Now come the defendants and for answer to the second amended complaint, allege and aver:

I.

That prior to the commencement of this action, more than one year had passed since the knowledge by the plaintiff of the alleged false and fraudulent acts of the defendants in the amended complaint set forth.

II.

That prior to the commencement of this action more than
34 four years had elapsed since the alleged representations and acts of the defendants and each of them, and since the exe-

cution and delivery of the said agreement on page seven of the second amended complaint set forth.

The defendants further answering said complaint, allege and aver:

I.

The defendants have no knowledge or information sufficient to form a belief, as to whether on the 5th day of June, 1903, or at any time, Mary Nielsen was duly or at all appointed by the probate court of the county of Pima, administrator of the estate of Carl S. Nielsen, or on the same or any day qualified as such, and gave bond according to law, and therefore deny the same.

II.

The defendants admit that the said Carl S. Nielsen mentioned in the amended complaint leased from the defendant Albert Steinfeld as trustee for one Julia W. Zeckendorf, the mine commonly known as the Old Boot mine, and allege that the said lease was oral and not in writing, and that according to the terms thereof, the said Albert Steinfeld as trustee as aforesaid, had the right to terminate the same without cause, at will.

Defendants deny that the defendant Steinfeld proposed to
35 the said Carl S. Nielsen that he should ship the products of said mine to market through the firm of L. Zeckendorf & Co. or that he should have credit with said firm for such goods or supplies as he might need in working said mine or running said mill, or that the said Nielsen accepted said alleged proposition; and the defendants allege that the said Nielsen was totally without money or credit with which to work the said mine and smelter, and that the said Nielsen solicited credit from the said firm of L. Zeckendorf & Co. and that the said firm extended to the said Nielsen in pursuance of Nielsen's solicitation certain credits and furnished him certain goods and supplies.

III.

The defendants deny that the prospects of said mine improved or grew better and better as said Nielsen continued to work said mine under said lease, and deny that the defendant Steinfeld through one J. N. Curtis, or at all, proposed to said Nielsen that a corporation be formed to purchase, own or operate said mine or any mining property or properties or claim or claims, or that the said Nielsen should turn over to the said or any corporation, all or any of his mining assets of any kind used or acquired in connection with the operation of said mine or that said Nielsen be given thirty or
any per cent of the capital stock of the said corporation for
36 the net assets to be turned over or at all, or that said Nielsen be made superintendent of said corporation or placed in charge of the work of the said mine and smelter or that said Curtis represented to Nielsen that larger or any means would be placed at his command for working said mine under said corporation than

he then had; and deny that said Nielsen upon consideration of said alleged proposition or representations of Curtis, made on behalf of the said Steinfeld or at all, accepted said alleged proposition; and the defendants allege that prior to the formation of the said corporation, the said Nielsen had operated the said mine and smelter under the said lease as aforesaid, and that the said firm of Zeckendorf & Co. had extended large credits to the said Nielsen, and that at the time of the formation of said corporation the said Nielsen owed a large sum of money to the said firm, and was absolutely unable to pay the same; and that said Nielsen solicited and asked of the said firm further time to pay his said obligations, and further and larger credits of money, goods and supplies, and that the said firm refused to extend any further credit, goods or supplies to the said Nielsen, and that thereupon the defendant corporation was organized as on pages 3 and 4 of the second amended complaint set forth.

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IV.

The defendants admit that the said Nielsen turned over to the said corporation all of his assets in connection with the said mine, of every kind, and allege that such corporation in consideration of such transfer, issued all its capital stock to the said Nielsen, and in further consideration duly assumed the payment of all the outstanding liabilities of said Nielsen incurred in connection with the work of the said mine and smelter; and defendants deny that the said assets turned over to the said Nielsen exceeded the said liabilities so assumed by the said corporation by a considerable sum of money or at all, and allege that the said liabilities of the said Nielsen far exceeded in value the said assets so turned over by him as aforesaid; and defendants deny that during all or any of the time during which the said Nielsen operated the said mine or smelter the prospects of said mine continued to improve or grow better, and allege that the indebtedness of said corporation largely increased during the superintendency of said Nielsen and that the said corporation was at all times wholly unable to pay its debts and had no means of operating said mine or smelter and was only able to do so by means of credits extended to it voluntarily by said firm of L. Zeckendorf & Co.

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V.

Defendants deny that any agreement existed between the said Nielsen Mining and Smelting Company and the firm of L. Zeckendorf & Co. whereby the said firm of L. Zeckendorf & Co. were to have the shipping of the products of the said mine or the collection of the proceeds thereof, or whereby all or any money, goods or supplies to be used in the working of said mine or smelter were to be obtained from the said firm of L. Zeckendorf & Co. or whereby the said firm of L. Zeckendorf & Co. would be paid for any money, goods or supplies furnished by them to the said corporation only out of the proceeds of the said mine; and defendants deny that on or

about the first day of February, 1900, or at any time, said Steinfeld undertook to discharge the said Nielsen from his position as superintendent of said company, or that said Steinfeld ordered said mine or smelter to be shut down and all work thereon stopped as soon as the then present supply of coke thereon should be exhausted except as hereinafter alleged; and allege that prior to the alleged attempted discharge of said Nielsen by said Steinfeld and prior to the ordering of said mine and smelter to be shut down, a majority of the directors of said company met informally and decided, determined and resolved to discharge the said Nielsen as superintendent, and to shut down said mine
39 and smelter, and that the acts of said Steinfeld in undertaking to discharge the said Nielsen and ordering the said mine and smelter to be shut down were in pursuance of said decision, determination and resolution of the said directors of the said corporation; and defendants deny that during the last five or six months of the superintendency of the said Nielsen, the said Steinfeld kept representing to the said Nielsen through said Curtis, that said corporation was getting deeper and deeper into debt to said firm of L. Zeckendorf & Co., or at about the time said mine and smelter were shut down, represented to said Nielsen through said Curtis that said corporation was at the time of such shut down indebted to the said firm in the sum of $75,000 to $85,000.

VI.

The defendants deny that the said Steinfeld proposed to the said Nielsen to purchase his said 300 shares of stock at a nominal price or that the said Steinfeld threatened if said Nielsen did not accept said alleged offer or any offer or terms or threatened at all that he would cut said Nielsen off without paying one cent or anything whatever for the said stock; and deny that the said Nielsen believing from said alleged representations that said corporation was indebted to the said firm in the sum of $75,000 to $85,000, or, know-
40 ing that all or any of his means were tied up in said corporation or that he was without means to pay said indebtedness, or believing himself to be at the mercy of said Steinfeld, or fearing from said alleged threats or at all, that he would get nothing for his said stock if he refused to accept Steinfeld's offer, he and the said Mary Nielsen, his wife, were driven, coerced or defrauded by reason of the alleged threats or representations into *singing* their names to the agreement on page seven of the second amended complaint set forth; and the defendants allege that the said agreement was signed and executed by the said Carl S. Nielsen and Mary Nielsen, his wife, freely, of their own will, and that they were not induced to execute the same by any fraud or false representations or threats or artifices of any kind or character, but with full knowledge of all the facts connected with the transaction in said agreement consummated, and because they believed it was to their best interest to execute the same.

VII.

Defendants deny that said Steinfeld purchased surrounding or neighboring mining claims at mere nominal prices, and alleges that he purchased said claims after considerable negotiation with the owners thereof; and denies that he afterwards took or received from said Silver Bell Copper Company for all or any of said certain mining claims so purchased, the full price which he had paid for the same with interest, or all of his expenses incurred in purchasing said claims.

Defendants deny that on or about the 20th day of May, 1903, or at any time said Steinfeld sold all of the property of the said Silver Bell Copper Company to the Imperial Copper Company, a corporation, at the price of $515,000, and deny that said Steinfeld received or collected the proceeds of said sale, to-wit, the sum of $515,000 or applied $275,000 thereof to his own use; and deny that the $10,000 paid by said Steinfeld to Mary Nielsen on the 23d day of January, 1904, was the full purchase price of said 300 shares of stock; and allege that at the time of the execution of the agreement on page 7 of the second amended complaint set forth, the said Steinfeld paid to the said Carl Nielsen $2,000 being part of the purhase price of the said stock.

Defendants deny that said Steinfeld caused a certificate of stock for said 300 shares to be issued in the name of Albert Steinfeld, trustee, and deny that the said Steinfeld held said stock in fact or in law as trustee for the plaintiff Mary Nielsen, administratrix, or in any way, or in any capacity; and deny that the said Steinfeld has ever held or continued to hold, or now holds or continues to hold said stock as trustee for the said Mary Nielsen as administratrix, or in any way; and denies that the said certificate of stock was so issued to said Steinfeld as trustee with the purpose or intent that he should take or hold the same as trustee for the plaintiff, said Mary Nielsen, administratrix, or in any capacity whatever.

Defendants deny that on the 29th day of June, 1900, or at any other time, the defendant Steinfeld required or compelled said Carl Nielsen and Mary Nielsen or either of them to sign or deliver to him a written transfer or any transfer of such 300 shares of stock in the Nielsen Mining and Smelting Company, and also their right, title and interest or claim of any kind in or to any properties or effects of the Nielsen Mining and Smelting Company; but allege that on said date the said Carl S. Nielsen and Mary Nielsen did voluntarily and for a valuable consideration, sign and deliver to the defendant Steinfeld a written transfer of the said 300 shares of stock. Defendants deny that no consideration was in fact paid for said conveyance and transfer and that the same is and was wholly without consideration; and deny that same was done solely with intent and purpose of vesting the title to the said stock in the said Steinfeld as trustee, to be held by him in trust for the said Carl S. Nielsen or Mary Nielsen or either of them until the said sum of $10,000 should be paid to them; and defendants allege that the said conveyance and transfer was made voluntarily to the said

Steinfeld individually and that the property so transferred was conveyed and transferred to the defendant Steinfeld for a valuable consideration, and not in trust for the said Carl S. Nielsen or Mary Nielsen or either of them or any person whomsoever; and defendants deny that the said defendant Steinfeld required the said Carl S. Nielsen to endorse in blank the certificate of stock held by the said Nielsen in the said Nielsen Mining and Smelting Company; and denies that said endorsement of the certificate of stock by the said Carl S. Nielsen was wholly without consideration or was made solely for the purpose of vesting the legal title to the said stock in the said Steinfeld as trustee; but allege that said Carl S. Nielsen voluntarily and for a valuable consideration and as a part of the transaction by which said shares of stock were conveyed to the defendant Steinfeld, and for the purpose of effectuating such conveyance, did endorse the certificate representing said 300 shares of stock in said Nielsen Mining and Smelting Company in blank and deliver said certificate to the defendant Steinfeld. And defendants deny that all the contracts, transfers and endorsements mentioned in said third amended complaint were made to the defendant Steinfeld with the dis-
44 tinct purpose and intent that he should not acquire any interest in said stock until the whole sum of $10,000 was paid, and that the said stock should in fact belong to the said Carl S. Nielsen and Mary Nielsen until fully paid for; and allege that such contracts, transfers and endorsement were made for the purpose of absolutely transferring and conveying said stock to said defendant Steinfeld, and that such stock was on said 29th day of June, 1900, absolutely sold, transferred and assigned by the said Carl S. Nielsen and Mary Nielsen for a valuable consideration to defendant Steinfeld.

And defendants deny that neither the said Setinfeld nor the said Nielsen Mining and Smelting Company complied with the terms of the agreement made by them on the 29th of June, 1900, and deny that the payment of the sum of $10,000 was not made by them or either of them at or within the time provided by the said contract; and deny that the said contract became and was forfeited and of no effect; and deny that the plaintiff became or was entitled to have the stock so transferred to and received by the defendant Steinfeld, returned to her as administratrix of the estate of the said Carl S. Nielsen, together with any dividend or payment made thereon by the said corporation and received by the said Steinfeld either as in said third amended complaint alleged or otherwise; and aver that
45 the said sum of $10,000 was paid by said Steinfeld to said Mary Nielsen within the time provided by said contract, and was received and accepted by the said plaintiff as full payment and settlement of all amounts provided to be paid in and by the said contract and without objection on account of the time the same was paid, and that said plaintiff has ever since retained and still retains the said sum.

And defendants deny that at various times after the lapse of thirty days from the sale of the said Silver Bell Copper Company to the Imperial Copper Company plaintiff demanded of the defendant

Steinfeld that any sum of money due on said contract be paid to her, and deny that said Steinfeld refused and failed to pay the same, and aver that said sum was in fact paid to said plaintiff by said defendant Steinfeld long prior to the time that the purchase price of said property was fully paid, and long prior to the time the same became due and payable under the terms of the said contract, and that the said sum when paid was received and accepted by the said plaintiff as full payment in accordance with the terms of said contract; and deny that said plaintiff did not know at the time of such payment or at any time that no dividend had been paid by the said company or received by said defendant Steinfeld; and deny
46 that said defendant Steinfeld was in duty bound to inform said plaintiff of the payment of any dividend, and denies that said plaintiff had any interest in such dividend or was entitled to knowledge or information of the payment thereof.

Defendants have no knowledge or information sufficient to form a belief, and therefore deny, that at the time the plaintiff received from defendant Steinfeld the sum of $10,000 she had no legal adviser or was ignorant of the fact of the declaration of such dividend, and believed that she was still bound by the said contract of June 29, 1900; and deny that the said contract was illegal or of no effect or that the said Steinfeld or the said Nielsen Mining and Smelting Company had no right to endorse the same; and aver that at the time of such payment by said Steinfeld to said plaintiff of the sum of $10,000 the said contract was a valid contract and so continued to be until the full cancellation and discharge of said contract and of the rights of plaintiff thereunder by payment to her by said Steinfeld of said sum of $10,000 as aforesaid; and defendants deny that at the time plaintiff received the sum of $10,000 she had no right to waive or release any right or interest in said stock which belonged to the said Carl S. Nielsen or to do anything to deprive the said Nielsen or his heirs of the right to the return
47 of said stock, and allege that at the time of said payment by the defendant Steinfeld to said plaintiff of said sum of $10,000 there had been no breach of the said contract, and that at said time, neither the said plaintiff nor the said estate of said Nielsen or his heirs had any right or interest in the said stock or any right to the return thereof.

And these defendants further state that they have no knowledge or information sufficient to form a belief as to whether said Nielsen Mining and Smelting Company was without legal power to execute the contract or as to whether the same was never in fact executed by anyone in authority or having authority to make such contract or to bind the said company thereto, or whether the said company could not for the consideration set out in said contract use its assets to carry out said contract or whether by the terms of said contract no benefit or advantage would pass to the said company and leave the plaintiff to make such proof thereof as may be deemed material; and these defendants deny that such contract was without consideration or a nullity or *or* no legal effect; and avers that the same was in all respects at all times a valid and subsisting contract; and aver that said stock was purchased and the consideration for the

purchase price thereof paid by the said Steinfeld individ-
48 ually; and that the title and ownership of said stock from the time of the making of the said contract and the execution and delivery of said written instrument and the assignment and transfer of the said stock to said Steinfeld and of the endorsement and delivery of the certificate representing such stock, to the said Steinfeld, has been vested in defendant Steinfeld, and that the said property is the sole property of the defendant Albert Steinfeld, and is not and never has been held by him in trust for the plaintiff or for any other person or persons whomsoever; and defendants deny that said contract is or was wholly ineffectual and deny that the same did not or could not give any rights to the said Steinfeld or impose any duties upon the said plaintiff or the said Carl S. Nielsen; and aver that the said contract was at all times a valid and subsisting contract and binding and effectual as to all the parties thereto.

And defendants admit that at the time the said plaintiff received the said sum of $10,000, she believed that both she and the heirs of Carl S. Nielsen were bound by the said contract, and that she did not know of any defect or invalidity of said contract, and aver that at said time both plaintiff and the heirs of said Carl S. Nielsen were in fact bound thereby, and that said contract was in all respects a valid and subsisting contract.

Defendants deny that said Steinfeld after the organization
49 of said corporation, or at any time conceived or put into execution the, or any design of forcing the said Nielsen out of said corporation or of acquiring his said 300 shares of stock for a mere pittance of the real value thereof or at all or in order to accomplish said purpose and design the said Steinfeld shut down said mine or smelter, or caused said Nielsen to be discharged as such superintendent, or falsely represented to the said Nielsen that the indebtedness of the said corporation to said firm of L. Zeckendorf & Co. amounted to from $75,000 to $85,000 or made any representation to said Nielsen whatever, or threatened if said Nielsen did not accept his alleged offer for said shares of stock that he would cut him off without anything for the value thereof.

And defendants allege that on or about the said 20th day of May, 1903, the defendant corporation and the said Steinfeld and the said corporation in the complaint mentioned, the Mammoth Copper company, did convey and sell for the sum of $515,000, to the Imperial Copper company, a group of mines, a part of which said group was the property of the defendant corporation and a part whereof was the property of the said Mammoth Copper company and the said Albert Steinfeld, and that that portion of the said mines which was the property of the defendant corporation, as
50 defendants are informed and verily believe, was not more than one-third of the value of the entire group of mines which were so sold to the said Imperial Copper company.

VIII.

Defendants deny that the said Steinfeld made representations that the indebtedness of said corporation to the firm of L. Zecken-

dorf & Co. amounted to from $75,000. to $85,000. or that said Steinfeld at any time knew that said alleged representations or any representations made by him were false at the time he made them; and deny that he made said alleged or any representations for the purpose of deceiving the said Nielsen, or for the purpose of acquiring his shares of stock or any thereof for a mere pittance of the value thereof, or at all; and deny that the said Steinfeld at such alleged time knew that said indebtedness did not exceed the sum of $30,000.; and upon information and belief, defendants deny that the said Nielsen and his wife, or either of them, relied upon said alleged representations of said Steinfeld, or believed the same to be true, or had no means of finding out the alleged falsity of such representations, for the reason that all the books or accounts of said corporation were kept in the charge or control of the said Steinfeld; and deny that the said Nielsen had no books or accounts or other means whatsoever whereby he could ascertain the
51 true amount of such indebtedness; deny that the said Steinfeld at the time the said mine and smelter were shut down or at the time the said Nielsen was discharged as superintendent, or at the time the said agreement on page 7 of the second amended complaint set forth was executed, knew that the property of the said corporation was worth a large sum of money; and deny that he concealed from the said Nielsen and his wife or either of them any negotiation whatever that he made for the sale of the property of the said company with any parties whatever.

IX.

Defendants deny that the said Steinfeld at all or any of the times mentioned or referred to in the second amended complaint dominated or controlled the said corporation or a majority of its board of directors or officers, or that he made the said Shelton and Curtis officers and directors of the said corporation because they were employés of his and that he knew that he could control or use them as he pleased, or that he did use or control them as he pleased, or that by reason of his alleged domination of said corporation or a majority of its stockholders and directors, said Nielson was powerless to resist when said Steinfeld ordered said mine and smelter shut down as aforesaid, and forced said Nielsen as alleged out of his position as superintendent.

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X.

Defendants deny that the said Steinfeld by reason of his alleged dominion or alleged control of the said corporation or its affairs, came to learn of the importance of acquiring the surrounding or neighboring claims acquired by him as aforesaid, or that a part of his purpose in shutting down said mine and smelter was to acquire the same as cheap as possible, or that he did acquire the same at a very low figure thereby; and deny that said Steinfeld for the reason alleged in the second amended complaint or for any reason or at all became or was in said purchase a trustee for the said Silver Bell

Copper Company or acknowledged himself so to be afterwards, or that he took or received from said company pay for the same in full or at all, or that by reason thereof, the whole or any part of the proceeds of the sale of said properties to the said Imperial Copper Company became or were the property of the said Silver Bell Copper Company, or that the said 300 shares of stock owned by said Nielsen was entitled to thirty per cent of the net proceeds of said sale or to any sum in excess of the $111. per share declared as a dividend upon said 300 shares of stock. The defendants deny that the one share of stock in the name of R. K. Shelton was owned by the defendant Steinfeld; and deny that neither the firm of L. Zeck-
53 endorf & Co. nor the said Curtis nor the said Albert Steinfeld as trustee for Julia Zeckendorf or the said Shelton or said Steinfeld ever paid anything of value for said shares of stock so owned or held by them. Deny that the firm of L. Zeckendorf & Co. were by agreement with said corporation made the sole bankers or supply house for said corporation; deny that no consideration was paid by Steinfeld to said Nielsens or to either of them for said shares of stock at the time of the execution of the agreement of June 29, 1900, or that no benefit or advantage arose or accrued to said Nielsens; deny that the whole of the benefits or advantages arising or accruing from said agreement arose or accrued to said Steinfeld or the said corporation; and deny that such agreement was void for want of consideration or at all; and allege that at the time of the execution of said agreement the said Steinfeld paid to the said Nielsen $2,000. in consideration thereof.

XI.

Upon information and belief, defendants deny that the said Nielsen died without having learned of the alleged falsity of the alleged representations of the said Steinfeld as to the amount of indebtedness of the said corporation to the firm of L. Zeckendorf & Co.; and deny that the said Mary Nielsen never learned of the alleged falsity of the said representations until within less than one year
54 prior to the institution of this action; and deny that at the time the said Mary Nielsen received the said $10,000. from the said Steinfeld she was ignorant of any of her alleged rights in the premises.

XII.

Defendants deny that the said agreement of June 29, 1900, was a mere executory contract or option or was of no legal force or effect whatever until such consideration of $10,000 was paid; and deny that the sum received by said Steinfeld as dividend on said shares of stock or any thereof, was the property of the plaintiffs or should have been paid to said Mary Nielsen as administratrix, or in any capacity whatever; and deny that the said administratrix is entitled to a judgment for said sum or without interest, or for any sum whatever.

XIII.

Defendants deny that during the last 3 or 4 months said Nielsen operated said mine and smelter as superintendent of said corporation, the products thereof amounted to $30,000, per month for each of said months, or that said Nielsen could or would thereby have paid off all or any indebtedness of said corporation in a short or any time.

Wherefore, defendants demand judgment that the plain-
55 tiff recover nothing, and for their costs herein, and for such other and further relief as may be just.

EUGENE S. IVES,
Attorney for Defendants.

And for a further and separate defense the defendants allege that at the city of Tucson, Pima county, Arizona, on the 23d day of January, 1904, the defendant Albert Steinfeld paid to the plaintiff the sum of $10,000., and that in consideration of such payment the plaintiff both individually and as administratrix of the estate of Carl S. Nielsen, deceased, released and discharged the said defendant Albert Steinfeld and the Nielsen Mining and Smelting Company and the Silver Bell Copper Company and each of them from all claims and demands which the plaintiff or said Carl S. Nielsen or the estate of Carl S. Nielsen had against them, or either of them, and then and there executed and delivered to the said Albert Steinfeld in instrument in writing, by the terms of which said plaintiff individually and as administratrix of the estate of Carl S. Nielsen, did release and discharge the said Albert Steinfeld and the said Nielsen Mining and Smelting Company and the said Silver Bell Copper Company and each of them from all claims or demands of any kind or character which the said plaintiff either individu-
56 ally or as such administratrix or the said Carl S. Nielsen had at any time had against said Steinfeld or either of said companies.

Wherefore, defendants pray judgment that plaintiffs take nothing by this action, and that they have judgment for costs.

EUGENE S. IVES,
Attorney for Defendants.

(Duly verified by Albert Steinfeld for himself, and by R. K. Shelton as secretary of the Silver Bell Copper Company, for that company.)

(Filed as answer to second amended complaint March 16th, 1908.)

(Additional matter in answer to third amended complaint filed March 30th, 1908.)

Immediately before the trial, in open court, counsel for the respective parties made the following stipulation with respect to the answer of the defendants to the plaintiff's third amended complaint:

Stipulation.

It is stipulated between counsel for the respective parties that the answer to the second amended complaint in connection with the matter now filed as an answer to pages 11, 12, 13 and 14 of the third amended complaint and the matter filed as an additional defense, shall together be taken as an answer to the third amended complaint, and may be inserted at any time in its proper place.

57 [Title of Cause.]

Demurrer and Replication.

Plaintiff demurs to paragraph two of defendants' answer to the third amended complaint, which answer was filed on the — day of March, 1908, and assigns the following ground of demurrer:

I.

That the same is no answer to the said third amended complaint.

And plaintiff demurs to that portion of defendants' answer to said third amended complaint, which answer was filed on the 30th day of March, 1908, in which defendants as a further and a separate defense set up a pretended release and discharge by reason of said Mary Nielsen having accepted ten thousand dollars from the said Steinfeld on January 23rd., 1904, and assigned the following ground of demurrer:

1. That the same is no answer to said third amended complaint.

Reply.

I.

Comes the plaintiff and subject to the demurrer filed to the separate and further defense of defendant filed in this cause on March 30, 1908, for reply to the answer of defendant to plaintiffs'
58 third amended complaint, plaintiff says that at the time the said sum of ten thousand dollars was paid to her by the said Steinfeld on the said 23rd. day of January, 1904, she did not know that the said Steinfeld had shut down said mines for the purpose of forcing said Nielsen out of his interest in said Nielsen Mining & Smelting Company; that she did not know that the debts of said company to the said L. Zeckendorf & Co. at the time of the shutting down of said mines was only about the sum of thirty thousand dollars, and that the said debts were being rapidly reduced by the operation of the smelter; and avers that prior to the execution of said contract of June 29th., 1900 the said Steinfeld and the said Curtis both represented to the said Carl S. Nielsen and to the plaintiff that the said Nielsen Mining & Smelting Company was indebted to L. Zeckendorf & Co. to the amount of about seventy-five or eighty-

five thousand dollars; and avers that the said Steinfeld, both verbally and in writing represented to the said Carl S. Nielsen that the said company was deeply indebted to said firm, and that little headway was being made in reducing said indebtedness, and that for such reasons the smelter should be closed; and did order and compel the said Nielsen to shut down said smelter when the same was being run at a profit of about four hundred dollars a day; and avers that prior to the execution of said contract of June 29th., 1900 the
59 said Steinfeld did threaten that if the said Carl S. Nielsen and this plaintiff did not agree to transfer to him the stock owned by the said Neilsen that he would get nothing for his said stock; that the representations of the said Steinfeld as to the amount of the said indebtedness of said firm so made by the said Steinfeld and the said Curtis were false, and were made for the purpose of deceiving the said Carl S. Nielsen and this plaintiff, and did deceive them. That they executed said contract of June 29th., 1900, and transferred *to* the stock of the said Nielsen to the said Steinfeld, relying on the said Steinfeld's representations and the said Curtis, and believing them to be true; that the said sum of ten thousand dollars was a grossly inadequate consideration for the stock of said Nielsen, and that the said sum was agreed upon, and the said contract of June 29th., 1900 was executed because the plaintiff and said Nielsen believed the said representations of said Steinfeld, and because they knew the said Steinfeld was the virtual dictator of said corporation and had power to carry into effect his threat that if the said Nielsen did not transfer his said stock to him he would get nothing for it; and plaintiff avers that at the time she took said sum of money from the said Steinfeld and signed the alleged release she did not know that the said contract of June 29th., 1900
60 had been obtained from herself and the said Nielsen by means of false statements and representations, as set out in plaintiff's third amended complaint, but believed that the said contract was binding upon her as administratrix and individually, and was ignorant of the fact that any dividend on said stock had been declared by said company or received by said Steinfeld; and plaintiff avers that the said Steinfeld paid said sum of ten thousand dollars to said plaintiff well knowing at the time that the said contract of June 29th, 1900 and the transfer of the stock of the said Carl S. Nielsen to him had been obtained by him by means of false and fraudulent misrepresentations, and well knowing that the plaintiff was ignorant of the falsity of such representations made by him and Curtis; and that the said plaintiff was ignorant of the fact that a dividend had been declared by said company and received by him, and that said payment of the said sum of ten thousand dollars was made to the plaintiff in order to carry out said alleged contract of June 29th., 1900 and to acquire the stock of the said Nielsen for a grossly inadequate consideration in fraud of the rights of plaintiff and the heirs of the said Carl S. Nielsen; and plaintiff avers that the said payment of said sum was but the final step in the fraudulent plan and purpose of the said Steinfeld to cheat and defraud

the said Carl S. Nielsen and this plaintiff; and that the
61 said sum was received by her in ignorance of the facts, and plaintiff avers that had she known the falsity of the representations of the said Steinfeld and the said Curtis she would not have received the said sum of ten thousand dollars, or signed or delivered said receipt or release.

GEO. W. LEWIS,
FRANCIS M. HARTMAN,
W. H. SAWTELLE,
EDWIN F. JONES,
Attorneys for Plaintiff.

(Duly verified by Mary Nielsen.)
(Filed March 30th, 1908.)

[Title of Cause.]

Findings of Fact.

This cause came on regularly for trial in the above entitled court, before the Hon. John H. Campbell, judge thereof, presiding, sitting without a jury, a jury having been theretofore regularly waived by all the parties, on the 30th day of March, 1908, all of the parties being present in person, and also by their attorneys; evidence oral and documentary having been regularly introduced and offered by the respective parties, and received by the court, and submitted to it for its decision. After due consideration of the pleadings and
62 all the evidence admitted in the case, and being fully advised in the premises, the court finds the following to be the facts in the case:

I.

That the plaintiff, Mary Nielsen, is the widow of the late Carl S. Nielsen, who died intestate on or about the 5th day of March, 1901, in Pima county, Arizona territory, leaving as his sole heirs at law, his said widow, Mary Nielsen, and their four children, Hilda S., Guynne E., Ian W. and Richard H. Nielsen, then aged thirteen, eleven, nine and seven years respectively: That on the 5th day of June, 1903, the Probate Court of said Pima county, granted letters of administration on the estate of the said Carl S. Nielsen, and said Mary Nielsen was by the said court duly and legally appointed administratrix of his estate, and duly qualified as such, and since said 5th day of June, 1903, the said Mary Nielsen has been and now is the duly qualified and acting administratrix of the estate of the said Carl S. Nielsen; and that the said Carl S. Nielsen in his life time was a citizen and resident of the county of Pima, territory of Arizona.

II.

That the defendant, Albert Steinfeld is a citizen and resident of the county of Pima, territory of Arizona, and resides in the city of

Tucson. That the defendant, the Silver Bell Copper Com-
63 pany, is a corporation duly organized and existing under the laws of the territory of Arizona; that said corporation was organized on the 14th day of January, 1899, under the name of the Nielsen Mining & Smelting Company; and that, by resolution of the board of directors, made on or about the 14th day of January, 1901, its name was changed to the Silver Bell Copper Company, and since that date and up to the present time the said corporation has conducted its business under and by the name of the Silver Bell Copper Company.

III.

That about the end of the year 1897, said Carl S. Nielsen leased from Albert Steinfeld, as trustee for Julia Zeckendorf, the then unpatented mining claim, situated in the Silver Bell Mining district of Pima county, Arizona, known and called the Old Boot mine. That said lease was oral and terminable at will.

That under said lease the said Nielsen was to have the privilege of working said mine and extracting and shipping and selling ores therefrom on the payment to said Steinfeld as such trustee of a royalty of $1.25 per ton on all ore extracted and shipped or smelted by him, and the said Nielsen was to do the annual assessment work on said claims.

That soon thereafter said Nielsen took charge of said mine and proceeded to work the same under said lease and extracted
64 therefrom and smelted at the smelter erected thereat and shipped large quantities of ores: and during the time the said Nielsen was so operating he obtained his supplies from Wheeler & Perry, who were engaged in the mercantile business in the city of Tucson, Arizona, and shipped the product of such mine through the bank.

While Nielsen was so engaged in conducting his said business, one Hugo J. Donau who was in the employ of L. Zeckendorf & Co., a firm composed of L. Zeckendorf & Albert Steinfeld, on behalf of said firm, proposed to said Nielsen that then and thereafter the products of said mine be shipped through the firm of L. Zeckendorf & Co., who would make advances and furnish supplies to be used in the working of said mines, the same to be paid for out of the product of said mine. Said proposition was agreed to and accepted by said Nielsen, and then and thereafter all the product of said mines was so shipped and certain supplies were furnished him by said Zeckendorf & Co., and the proceeds of said product were collected by said firm and applied thereon. This agreement was not by its terms to exist for any specific time.

That at the time the said Donau made said proposition he was in the employ of and acting on behalf of said firm, and at
65 such time said Albert Steinfeld was the managing partner of said firm and in charge of its affairs.

That the prospect of said mine grew better as said Nielsen continued to work the same under said lease.

That during the time said Nielsen operated said mine under said lease and prior to the organization of the Nielsen Mining and Smelt-

ing Company he developed large quantities of ore in said Old Boot mine, and erected and used a smelter for the treatment of the ores therefrom, and expended large sums of money in developing said mine and in the erection of said smelter.

That on the 14th day of January, 1899, the said Nielsen was indebted to the following persons in the following sums, to-wit:

L. Zeckendorf & Co.	$16,608.27
L. Zeckendorf & Co.	826.25
Wheeler & Perry	2,027.27
C. T. Etchels	110.00
C. F. Schumacher	160.00
W. J. Corbett	75.00
Gardiner, Worthen & Goss	438.85
J. Dobson	20.00
Employees	1,221.12
Total	$22,886.86

and the said Nielsen had on hand at the mine, property, and
66 had in transit to market, products of said mine and smelter, which were valued by the said Nielsen and the said Curtis representing the firm of L. Zeckendorf & Co., and the said Steinfeld, at a sum slightly in excess of the debts owing by the said Nielsen, including all debts due by him to the said firm of L. Zeckendorf & Co.

IV.

That while the said Nielsen was operating said mine under said lease the said Albert Steinfeld procured J. N. Curtis to go out and examine the said mine and after such examination the said Curtis proposed to the said Nielsen to organize a corporation to take charge of *an* operate said mine and smelter belonging to said Nielsen. That as a result of said proposal and the negotiations which followed it, the Nielsen Mining and Smelting Company was, on the 14th day of January, 1899, duly organized under the laws of the territory of Arizona. That the capital stock of said company was $25,000.00, divided into one thousand shares of the par value of $25.00 each, which said stock was fully paid up and non-assessable. That the incorporators of said corporation were J. N. Curtis, R. K. Shelton and C. S. Nielsen, and that upon the organization of said company the said J. N. Curtis R. K. Shelton and C. S. Nielsen became directors thereof, and the said J. N. Curtis was elected president and treasurer of said company, the said R. K. Shelton was elected secretary
67 of said company, and the said Nielsen was elected vice president of the said company.

That at the first meeting of the board of directors of said Nielsen Mining & Smelting Company, held January 14th, 1899, the said Nielsen made a proposition to the company to sell to it his smelting plant on or near the Mammoth Mill-site, or Old Boot mine, all the machinery, tools and appliances and personal property owned and used by him in connection with said smelting plant, and also all

leases and licenses to work said mines and mining claims in the Silver Bell Mining district which he then had, in consideration of the corporation issuing to him nine hundred and ninety-seven shares of its capital stock, full paid and non-assessable, and also upon the company assuming and paying an indebtedness to various persons, a list of which he presented and which is the list set out in Finding III, which said indebtedness was secured by copper bullion in transit to market through the firm of L. Zeckendorf & Co., and in which he agreed to assign to the company his equity.

That the said proposition was duly accepted by the corporation, and the said Nielsen duly transferred to the corporation the property mentioned in his offer, and received a certificate to the effect that he was entitled to receive therefor nine hundred and ninety-
68 seven shares of the capital stock of said corporation.

That the president reported a list of debts assumed by the said corporation, which said list is set out in Finding III, amounting to $22,886.86, and reported that the said sum of the indebtedness was secured by large shipments of copper bullion in transit.

That by motion duly made the board of directors of said corporation agreed to accept the report of the president concerning said proposal by the said Nielsen and its acceptance by the president and his actions in the premises were ratified and confirmed.

It was also resolved by the board of directors that the corporation take immediate charge and control of the smelting plant and property purchased, and that it continue the mining operations thereat.

On motion it was unanimously agreed that Carl S. Nielsen be elected superintendent and act as such for a period of one year, and Mr. Nielsen accepted the position.

V.

69 That after the organization of said company it was agreed that the stock of said corporation should be issued as follows:

500 shares to L. Zeckendorf & Co., a partnership composed of Albert Steinfeld and Louis Zeckendorf, and a certificate of 499 shares was issued to said L. Zeckendorf & Co., and 1 share was issued to said Shelton.
170 " " J. N. Curtis.
30 " " Albert Steinfeld as trustee for Julia Zeckendorf.
300 " " Carl S. Nielsen.

and certificates of stock were duly issued to the parties named above for the amounts above stated.

That immediately after the said Nielsen was elected superintendent he took charge of the property of the corporation, and, subject to the control of the said Curtis, who as president of said corporation had general control thereof, conducted the mining and smelting operations of the company for about one year, and during the time he so operated said mine large quantities of valuable ores were extracted therefrom, smelted and the product thereof shipped to market through the firm of L. Zeckendorf & Co., of which the said

Steinfeld was the managing partner, and other bodies of ore developed.

That after the organization of said corporation all the products of the mine and smelter were turned over to L. Zeckendorf
70 & Co., and all moneys, goods and supplies were obtained from the said firm of L. Zeckendorf & Co.

That during this time Albert Steinfeld was the active and managing partner of L. Zeckendorf & Co., and as such had absolute control over the credit extended by said firm to the Nielsen Mining & Smelting Company, and as a member of said firm he managed, controlled and voted the stock owned by said firm in said corporation, and by means of the stock owned by said firm, and the stock held by his as trustee for Julia Zeckendorf, he controlled a majority of the stock of said Nielsen Mining & Smelting Company, and though neither an officer or director of said company he dominated and controlled the same.

The share of stock standing in the name of R. K. Shelton belonged to and was the property of L. Zeckendorf & Co., and the said Shelton was but the representative of that firm upon the board of directors of said corporation and was dominated and controlled by the said Albert Steinfeld.

J. N. Curtis was the employee of the said firm of L. Zeckendorf & Co., and because of the business relations existing between the said Steinfeld and the said Curtis the said Curtis was largely influenced in his actions as a director of said corporation by the said Steinfeld.

That the power of the said Albert Steinfeld over the Nielsen
71 Mining & Smelting Company, and over the directors and officers thereof up to the purchase of the stock of C. S. Nielsen therein, on June 29, 1900, arose out of and was because of the fact that the said company was largely in debt to L. Zeckendorf & Co., and that L. Zeckendorf & Co. and the said Steinfeld as trustee for William and Julia Zeckendorf held a majority of the said stock of said company, and said Steinfeld as the manager of said firm of L. Zeckendorf & Co., having the power to control said indebtedness and to vote the stock of said L. Zeckendorf & Co., and as trustee for William and Julia Zeckendorf, having the power to vote their stock, and because of the fact that the said J. N. Curtis and R. K. Shelton were employees of the firm of L. Zeckendorf & Co., and under the direction and control of said Steinfeld, and because of the fact that the said Nielsen had all of his means tied up in the said company and was without means to secure the necessary supplies and advances to operate said mine and smelter, and because all of the product of said mine and smelter was turned over to the firm of L. Zeckendorf & Co., who determined the disposition thereof, and which firm collected all the proceeds thereof.

And that the said Albert Steinfeld as managing partner of L. Zeckendorf & Co. had the power to determine whether at any time further credit should be extended to said company and had
72 the power and legal right at any time to cease extending credit to the said company. That the said firm of L. Zeckendorf & Co. was under no obligation at any time to extend any

further credit to the said corporation, and had the legal right at any time to cease giving further credit and to enforce the collection of the amount owing to said L. Zeckendorf & Co. by said corporation.

VI.

That during the year 1899, large amounts of money were expended in developing and working said mine, and in the purchase and erection of machinery, buildings and other improvements on said mine and smelter, and thereby substantial quantities of valuable ore were discovered and developed therein, and the value of said mine was substantially increased thereby.

That shortly after the organization of said corporation an option was granted by Albert Steinfeld as trustee for William and Julia Zeckendorf to the said company, giving the said company the right to purchase the Old Boot mine for the sum of twenty-five thousand dollars, payable in quarterly payments of twenty-five hundred dollars each, and providing that in the event of failure to make payment of each such installment at the time it became due the said option and right thereunder should be forfeited. And that at the time of the shutting down of said smelter and the dis-
73 charge of said Nielsen as superintendent, as hereinafter stated there was still unpaid on said purchase price the sum of fifteen thousand dollars. Said last mentioned sum was after July 1st, 1900, paid by said company and said mines thereby became the property of said company, and was owned by it at the time of the sale thereof to the Imperial Copper company.

That during the months of October, November and December, 1899, and January, 1900, the smelter of the company was in active operation and was producing copper at a material and considerable profit, and the sale of the product of said smelter was materially reducing the debt owned by said company to the firm of L. Zeckendorf & Co. The exact amount of profit during the time is not shown by the evidence.

VII.

That some time in the year 1899 the said Steinfeld determined to get rid of Nielsen as a stockholder in said company, and on January 3, 1900, the said Steinfeld wrote the following letter to Nielsen:

"Mr. C. S. Nielsen, Red Rock, Ariz.

"Dear Sir: In view of the very large indebtedness existing against the company, and the fact that little headway is being made towards its liquidation, I have decided after careful consideration to close down both mine and smelter when the present coke
74 supply is exhausted, which would be about the 15th or 20th inst. You will please make all provision to this end incurring no larger outlay than is absolutely necessary for such articles as wood, ore and other supplies except what would be required for the purposes stated. The present good showing in the mine may place us in a position to sell the property at an advantageous

price and this will be my aim to do at the very earliest possible moment. It will also be wise for you to advise George in that no credits be extended to anyone beyond what can be collected during the time contemplated, and that every effort be made to collect all outstandings pending to date.

Yours truly,

ALBERT STEINFELD."

That at and prior to the time the said Steinfeld wrote said letter the said mine and smelter of said company were running at a considerable profit, and the debt due from said company to the firm of L. Zeckendorf & Co., was being substantially reduced, and that these facts were known to the said Steinfeld at the time he wrote and sent said letter to Nielsen.

That at the time he wrote said letter the said Steinfeld had made up his mind to shut down said mine and smelter for the purpose of acquiring the interest of Nielsen in said corporation, and for
75 the purpose of acquiring a certain adjoining group of mines known as and hereinafter referred to as the English claims before proceeding with the further development of the Old Boot mine, and wrote said letter in pursuance of his said purpose.

That the said English group of mines adjoined the said Old Boot mine, and if acquired for the corporation would greatly add to the value of the stock held by the said Nielsen in said corporation, all of which was known to said Steinfeld; that at the time the said Steinfeld wrote the said letter dated January 3rd, 1900 and at the time of the discharge of the said Nielsen as superintendent as hereinafter found, and at the time Steinfeld acquired the stock held by the said Nielsen as hereinafter found, the said Steinfeld intended and expected that the said corporation would acquire the said English group of mines, but did not disclose said fact to the said Nielsen.

That on or about the 1st day of February, 1900, the said Steinfeld, although he was neither a director or officer of said company, undertook to discharge said Nielsen from his position as superintendent of said company, and the said Nielsen refused to be discharged by the said Steinfeld. That at the time said Steinfeld undertook to discharge said Nielsen, he had not been authorized by the board of directors to do so, and had not consulted with
76 said board, and the said board had not in any way authorized anyone to discharge the said Nielsen as such superintendent.

That subsequently the directors Curtis and Shelton, for the purpose of making it appear from the records of the corporation that said Steinfeld had authority to discharge the said Nielsen, caused to be entered upon the corporate minutes of said company, as of the date of February 1st, 1900, the following resolution:

"On motion duly seconded it was resolved that C. S. Nielsen be and he hereby is discharged as superintendent of this corporation, and his salary as such be discontinued from this date."

Whereas, in truth and in fact the said resolution was not put upon the minutes and no meeting was held on February 1st, 1900,

and not until some days thereafter, on or about the 10th day of March, 1900.

And that thereafter, on or about the 10th day of March, 1900, the directors of the said corporation, at a meeting at which J. N. Curtis and R. K. Shelton only were present, but of which meeting said Nielsen had notice, passed the following resolution:

"On motion duly seconded the action of the board of directors at its meeting held February 1st, 1909, in discharging said
77 C. S. Nielsen as its superintendent is ratified, approved and confirmed.

"On motion it was unanimously resolved that the said C. S. Nielsen be and he is hereby discharged as superintendent of the company."

That at the time above last mentioned resolution of March 10th, 1900, was passed, reciting the ratification of the action of the meeting of February 1st, 1900, the said Curtis and the said Shelton well knew that no such meeting of the board of directors had been held on February 1st, 1900.

That on or about the 19th day of February, 1900, the said Nielsen, believing he had been regularly discharged as such superintendent by the board of directors, and believing the statements of said Steinfeld in his letter of January 3, 1900, and having all his means invested in said company, and the existing supply of coke then at the smelter being exhausted, and the said Nielsen being powerless to obtain supplies to run said mine and smelter, and all the assets of the said corporation being under the control of the said Steinfeld, did shut down the said mine and smelter and cease to be in possession and control thereof.

VIII.

That in January, 1900, said Steinfeld caused the development work on said mine to be stopped, the smelter however, was
78 run until sometime in February, 1900, at which time all the coke and supplies necessary for the operation of the smelter and substantially all of the ore which had been developed prior thereto were exhausted, but if the development work had not been stopped by the said Steinfeld, but had been continued during the operation of the said smelter, sufficient ore would have been developed to have kept the smelter continuously supplied. That the said Nielsen at the time of the closing down of the smelter knew the condition of the mine.

That at the time said Steinfeld had such mine shut down he was informed of the value of said Old Boot mine, and of the value of said adjoining properties thereto, and did not shut down said mine and smelter because of the very large indebtedness existing against said company and the fact that little progress was being made towards its liquidation, or because it was running deeper and deeper in debt to said L. Zeckendorf & Co., or because the ore was exhausted, but shut down the same solely and exclusively for the purpose of getting rid of the said Nielsen as a stockholder in said corporation

and to acquire his said stock and for the purpose of acquiring the English group of mines.

IX.

That after the mine and smelter of the said Nielsen Mining and Smelting Company had been closed down as aforesaid, the
79 said Steinfeld called upon the said Carl S. Nielsen, and proposed to buy his stock in said company and also all interest which the said Nielsen and one Lewis might have to the mines or mining claims situated in said Silver Bell Mining district.

That during the negotiations the said Steinfeld stated to the said Nielsen that if he did not take the offer of the said Steinfeld he would get nothing for his said stock.

That at the time the said Steinfeld was negotiating with the said Nielsen, the said Nielsen was in financial distress and was without means, and this fact was known to the said Steinfeld at the time.

That such negotiations were had on or about the 29th day of June, 1900. That the said Nielsen and the said Lewis executed to the said Steinfeld a quit-claim deed to the said Clarence and Identical mining claims for a recited consideration of two thousand dollars, and on the same day and at the time of the execution of the said agreement hereinafter set forth, said Carl S. Nielsen and Mary Nielsen executed and delivered to the said Steinfeld a bill of sale by the terms of which they sold, assigned and transferred unto said Steinfeld the said three hundred shares of stock, and also signed and executed upon the back of the certificate representing such
80 stock an assignment and transfer thereof to the said Steinfeld, and delivered said certificate with such assignment and transfer endorsed thereon to the said Steinfeld, and a contract was signed by Albert Steinfeld, Nielsen Mining & Smelting Company, by J. N. Curtis, president, Mary Nielsen and Carl S. Nielsen, but was never acknowledged by said Steinfeld or by said Curtis as president on behalf of the Nielsen Mining & Smelting Company. That the said deed, transfer and contract were prepared by S. M. Franklin, the attorney of the Nielsen Mining & Smelting Co., at the instance and upon the information furnished by the said Steinfeld, and was sent by Steinfeld to be signed and acknowledged before W. F. Cooper by Carl S. and Mary Nielsen.

That upon the execution and delivery of said deed, the said Steinfeld paid to Nielsen and to said Lewis the sum of two thousand dollars in cash as a consideration for said Clarence and Identical mining claims, which was equally divided between said Carl S. Nielsen and said Lewis, as the joint owner of said Clarence mine.

That said contract is in the words and figures as follows, to-wit:

"This agreement made the 29th day of June, 1900, between Albert Steinfeld and the Nielsen Mining & Smelting Company, a corporation organized and existing under the laws of the territory
81 of Arizona, parties of the first part, and Carl S. Nielsen, and Mary Nielsen, his wife, parties of the second part, witnesseth:

That the parties of the first part in consideration of the transfer by said Carl S. Nielsen to Albert Steinfeld of the three hundred

shares of the capital stock of the Nielsen Mining and Smelting Company, and in consideration of the parties of the second part executing their deed of quit claim and release of their interest in and to certain mining claims as fully appear from certain quit claim deed executed by the parties of the second said part and one L. B. Lewis, to said Albert Steinfeld, and in further consideration of the sum of one dollar by the said parties of the second part in hand paid to the parties of the first part, receipt whereof is hereby acknowledged, do hereby agree that they will pay unto the parties of the second part the sum of ten thousand dollars, lawful money of the United States, as soon as the Nielsen Mining & Smelting Company will consu-mate a sale of its mining properties which are situated in the Silver Bell Mining district, Pima county, Arizona, such sum to be paid within thirty days after such sale is completed.

Said parties of the first part further agree that in the event that the Nielsen Mining & Smelting Company should commence active operations that then and in that event the net profits which
82 may arise to said company from its said working and shipping and operating shall be applied first, to the payment of the debts of said company, second after said debts are paid said net profits up to the amount of ten thousand dollars shall be paid to the party of the second part, and upon full payment of said sum of ten thousand dollars out of said profits the parties of the first part hereto shall be relieved from all obligations to pay said parties of the second part a like sum of ten thousand dollars, or any part thereof, in the event said company consum-ates or completes a sale of its property as hereinbefore agreed; that is to say in no event shall said parties of the second part be paid more than the sum of ten thousand dollars.

In witness whereof the parties have hereunto placed their hands the day and year first above written. In triplicate.

ALBERT STEINFELD,
NIELSEN MINING & SMELTING CO.,
By J. N. CURTIS, *President*.
MARY NIELSEN.
CARL S. NIELSEN.

TERRITORY OF ARIZONA,
County of Pima, ss:

Before me, William F. Cooper, a notary public in and for the county of Pima, territory of Arizona, on this day personally appeared Carl S. Nielsen and Mary Nielsen, wife of said Carl S.
83 Nielsen, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purpose and consideration therein expressed, and the said Mary Nielsen, wife of said Carl S. Nielsen, having been examined by me privily and apart from her husband, and having the same fully explained to her, she the said Mary Nielsen acknowledged said instrument to be her act and deed and declared that she had willingly signed the same

for the purpose and consideration therein expressed, and that she did not wish to retract it.

Given under my hand and seal of office this 29th day of June, A. D. 1900.

WILLIAM F. COOPER,
Notary Public.

My commission expires March 13th, 1901."

That at the time said Steinfeld entered into negotiations for the purchase of the stock of said Nielsens, and the interest of said Nielsen and said Lewis in said mining claims, and at the time he procured the said Nielsen to sign the said deed, and transfer said stock and enter into and sign the contract above set out, he did not inform the said Nielsen that he had shut down the mine and smelter of said Nielsen Mining & Smelting Company for the purpose of getting rid of the said Nielsen, and for the purpose of acquiring the English claims, and did not inform the said Nielsen
84 that the said Steinfeld had no authority to do so when he attempted to discharge the said Nielsen, and did not inform the said Nielsen that the entry contained in said minute book of the company was a false entry purporting to have been made therein as a record of a meeting of the directors of said company held about the 1st of February, 1900, and did not inform him that no meeting of the directors was held on that day, and that the said minute book contained a false record of such pretended meeting.

That the said Nielsen at the time he signed said deeds and executed said contract, and made the said transfer of the stock in the Nielsen Mining & Smelting Company, did not know that the said Steinfeld had shut down said mine and smelter for the purpose of getting rid of Nielsen and acquiring his stock, and did not know that the said mine and smelter had been shut down while the same was making money in order to enable the said Steinfeld to acquire the title to the English group, and did not know that the said Steinfeld had no authority from the board of directors to discharge the said Nielsen, or that the record in the minute book of the company showing his discharge by said board of directors on or about the 1st day of February, 1900, was false and that no such meeting of the board of directors was ever in fact held, but
85 the said Nielsen believed that he had been legally and duly discharged and that the said Steinfeld had shut down said mine and smelter for the reasons stated in his letter of January 3, 1900, and acted and relied on such belief.

That the said Nielsen was in financial distress, and was without means to resist the will and direction of the said Steinfeld, and the said Steinfeld knew of the pecuniary condition of the said Nielsen.

That the said contract of June 29th, 1900, was not authorized by the board of directors of the Nielsen Mining & Smelting Company, and that said Curtis signed the same on the part of the company without any authority of the board of directors of said company at the instance and request of said Steinfeld.

That upon acquiring the said three hundred shares of stock as

aforesaid, the said Steinfeld surrendered the certificate standing in the name of Carl S. Nielsen, and there was issued in lieu thereof a certificate for three hundred shares in the name of "Albert Steinfeld, trustee," and said shares have since remained and now stand on the books of said corporation in the name of "Albert Steinfeld, trustee."

That neither the said Steinfeld nor the said Curtis made any false representations to the said Carl S. Nielsen or Mary Nielsen, or either of them with reference to the amount of the indebted-
86 ness of the Nielsen Mining & Smelting Company to L. Zeckendorf & Co., but said Carl S. Nielsen and Mary Nielsen had at all times the means of ascertaining the amount of the indebtedness of said corporation to L. Zeckendorf & Co., and could with reasonable effort have ascertained the same; and in all the transactions herein set forth neither the said Carl S. Nielsen nor Mary Nielsen relied on any such representations.

XI.

That the English group of mines were acquired by the said Steinfeld, and were, in May, 1903, together with the said Old Boot mine sold for the sum of five hundred and fifteen thousand dollars, and the entire proceeds of the sale became the property of the Silver Bell Copper Company.

That on or about the 20th day of January, 1904, the board of directors of the Silver Bell Copper Company declared a dividend of $111.00 per share on the capital stock of said company, and the said Albert Steinfeld received from the said Silver Bell Copper Company the sum of thirty-three thousand three hundred dollars as dividends on the three hundred shares of stock which he had obtained from the said Carl S. Nielsen as above set forth; that the said Steinfeld has kept and retained the said sum of thirty-three thousand three hundred dollars, and claims the same as his own.

87 That on the 23rd day of January, 1904, the said Steinfeld paid to the said Mary Nielsen the sum of $10,000.00, and received from the said Mary Nielsen a receipt therefor, which said receipt is in the words and figures following, to-wit:

"TUCSON, ARIZONA, *January* 23, 1904.

"Received from Albert Steinfeld the sum of ten thousand dollars ($10,000.00) the same being in full of all claims against Albert Steinfeld and the Nielsen Mining & Smelting Company or the Silver Bell Copper Company, or any or either of them, for all claims or demands which Carl S. Nielsen or Mary Nielsen have or had against the said Steinfeld and the said companies or both or any or either of them, of all kinds or character whatsoever; and I do hereby individually and as administratrix of the estate of Carl S. Nielsen, deceased, release the said Albert Steinfeld and the said Silver Bell Copper Company and the said Nielsen Mining & Smelting Company

from any and all claim whatsoever which I have in either of such capacities against them or either of them.

(Signed) MARY NIELSEN.
MARY NIELSEN,
Admx. of Carl S. Nielsen."

Witness-:
T. L. CULIN.
JOSEPH SEVERANCE.

88. That at the time said Steinfeld so paid said sum of money to the said Mary Nielsen, he did not inform her of the price at which the property of the Silver Bell Copper Company had been sold to the Imperial Copper Company, nor any of the terms of payment, or of any details thereof; that he did not inform her and she did not know that the said Silver Bell Copper Company had declared a dividend of $111.00 per share on its capital stock, and did not inform her that he, the said Steinfeld had received and then had in his possession the sum of thirty-three thousand three hundred dollars as dividends on the 300 shares of stock which he had obtained from the said Carl S. Nielsen, as aforesaid.

That the contract for the payment of the sum of ten thousand dollars at the times and under the conditions provided in said contract was not an adequate consideration for the three hundred shares of stock, and that the said Steinfeld knew at the time he obtained the execution of said contract and the transfer of said stock that the said contract was not a fair consideration for said stock; and at the time the said Steinfeld paid the said sum of ten thousand dollars to the said Mary Nielsen the said sum was not a fair value of said stock, but that the same was a grossly inadequate price for the said stock, all of which the said Steinfeld knew.

89 XII.

That said Carl S. Nielsen died on the 6th day of March, 1901, and without having learned of the facts hereinbefore found as to the reasons or any of them for said Steinfeld's causing the said smelter and mine to be shut down, which impelled the said Steinfeld to cause said smelter and mines to be shut down, and without knowledge of the reasons which influenced the said Steinfeld in acquiring the said three hundred shares of stock.

XIII.

That at the time the said Mary Nielsen received the said sum of ten thousand dollars and executed and delivered said receipt and release, she did not know that the representations in said letter of Steinfeld of January 3, 1900, were false, and did not know that at the time said Steinfeld wrote said letter he had resolved to shut down said mine and smelter for the purpose of acquiring the English claims, and for the purpose of getting rid of the Nielsens and acquiring the stock of the said Nielsen, and did not know that the said Nielsen had not been discharged by the board of directors on or about February 1st, 1900, and did not know that a false statement

had been caused to be entered in the minute book showing a meeting of the board of directors and the passage of a resolution discharging the said Nielsen as superintendent, and did not
90 know the amount of the proceeds of the sale of the property which had been received by the Silver Bell Copper Company, and did not know that any dividend had been declared on said stock, and did not know that the said Steinfeld at the time he paid her said sum had received the sum of thirty-three thousand three hundred dollars as dividends on said stock, and the said Steinfeld knew all of these things and did not disclose them to the said Mary Nielsen; and that the said Mary Nielsen was ignorant of the facts above set out, and received the said sum of money and executed and delivered the said receipt and release believing that the agreement of June 29, 1900, was a valid and binding contract, and that she and the estate of said Carl S. Nielsen were bound thereby, and the said plaintiff did not discover what the truth in relation to said matters set out in this finding was until within less than one year before the bringing of this action.

Done in open court this 30th day of July, A. D. 1908.

JOHN H. CAMPBELL, *Judge.*

(Filed October 24th, 1908.)

91 Here follows defendants' Motion for additional findings of fact, copy of which is omitted by direction of attorneys for appellant.

[Title of Cause.]

Judgment.

This cause came on regularly for trial on the 30th day of March, 1908, Francis M. Hartman, George W. Lewis, Edwin F.
92 Jones and W. H. Sawtelle appearing for plaintiffs, and Eugene S. Ives and S. L. Pattee appearing for defendants, a trial by jury having been expressly waived by the prospective parties, the cause was tried before the court without a jury, whereupon witnesses on the part of the plaintiff and defendant were duly sworn and examined, and documentary evidence introduced by the respective parties, and the evidence being closed the cause was submitted to the court for consideration and decision; and after due deliberation thereon the court finds:

That the plaintiff, Mary Nielsen, as administratrix of the estate of Carl S. Nielsen, deceased, is entitled to have the contract of June 29th, 1900, in relation to the three hundred shares of stock in said defendant corporation, mentioned and referred to in the complaint and the proceedings herein and the bill of sale of said shares of stock, dated the 29th day of June, 1900, and the transfer and assignment of the same, and all contracts and writings connected therewith and pertaining thereto, rescinded, set aside, cancelled and declared void and of no effect, and said three hundred shares legally and properly transferred and delivered to her as such administratrix, and the amount of the dividend declared by said corporation on

said stock, to-wit, the sum of thirty-three thousand three hundred dollars, less the sum of ten thousand dollars paid to said
93 Mary Nielsen on the 23rd day of January, 1904, together with the interest on said twenty-three thousand three hundred dollars, at the rate of six (6) per cent from the 20th day of January, 1904, paid by said Steinfeld to her as such administratrix.

It is therefore adjudged, ordered and decreed by the court that the contract of June 29th, 1900, in relation to the said three hundred shares of stock in said defendant corporation mentioned and referred to in said complaint and the proceedings herein, and the bill of sale of shares of stock dated June 29th, 1900, and the transfer and assignment of the same, and all contracts and writings connected therewith and pertaining thereto, and said receipt of January 23rd, 1904, be, and the same are hereby rescinded, set aside, cancelled and declared void and of no effect, and the said Mary Nielsen as such administratrix is hereby held and declared to be the owner of such stock; and the said Albert Steinfeld is hereby ordered and directed to properly and legally transfer and deliver to said Mary Nielsen, as administratrix as aforesaid, said three hundred shares of stock in said corporation, which said transfer shall be executed by said Steinfeld individually and as trustee, and the said corporation and its officers are hereby ordered and directed, upon surrender by her of said certificate of stock, to properly and legally trans-
94 fer said stock on the books of said corporation to said Mary Nielsen as such administratrix, and to issue to her as such administratrix a new certificate therefor.

It is further adjudged, ordered and decreed that the said Mary Nielsen as such administratrix have and recover of the said defendant, Albert Steinfeld, the sum of twenty-three thousand three hundred dollars ($23,300.00), together with interest thereon from the 20th day of January, 1904, to this date, at the rate of six per cent (6%) per annum, which said interest amounts to the sum of six thousand three hundred and twenty-nine and 83/100 dollars ($6,329.83) making a total of twenty-nine thousand, six hundred and twenty-nine and 83/100 dollars.

It is further adjudged, ordered and decreed that the plaintiff, as such administratrix have and recover of the defendants her costs in this behalf expended, which is taxed at the sum of fifty-five and 5/100 ($55.05) dollars.

Done in open court this 30th day of July, 1908.

JOHN H. CAMPBELL,
Judge of the District Court of the First Judicial District of the Territory of Arizona.

(Filed October 24th, 1908.)

And on the same day, to-wit: the fourteenth day of December, 1908, came the Appellants by their Attorney Eugene S. Ives, Esq., and filed in the clerk's office of said court, in said entitled cause, a certain Motion for New Trial in words and figures following, to-wit:

95 [Title of Cause.]

Motion for New Trial.

Now come the defendants and move for a new trial herein on the grounds:

1. That the court erred in admitting evidence.
2. That the court erred in rejecting evidence.
3. That the evidence does not sustain the judgment.
4. That the judgment is contrary to the evidence.
5. That the judgment is contrary to law.
6. That the evidence is insufficient to sustain the findings of fact or any of them.
7. That the court has failed to find upon questions of fact.

EUGENE S. IVES,
Attorney for Defendants.

(Filed August 3, 1908.)

And on the same day, to-wit: the fourteenth day of December, 1908, there was filed in the Clerk's office of said Court in said entitled cause a transcript of Minute Entries, Supersedeas Bond and Cost Bond, in words and figures following, to-wit:—

(Copies of Minute Entries of Oct. 23, 25, Nov. 6, 1905, May 5, June 28, Oct. 25, 27, Nov. 3, Dec. 15, 1906, May 18, June 1, 8, July 1, Sept. 3, 1907, March 7, and two orders of March 30, 1908, are omitted from the transcript by direction of attorney for Appellant.)

MARCH 30, 1908.

(Title of Cause.)

It is stipulated between counsel for the respective parties that the answer to the second amended complaint in connection with the matter now filed as an answer to pages 11, 12, 13 and 14 of the third amended complaint and the matter filed as an additional de-
96 fense shall together be deemed and taken as the answer to the third amended complaint and may insert it at any time in its proper place.

This matter came on this day regularly to be heard upon the demurrer of plaintiff to paragraph II of defendant's answer to the third amended complaint, Francis M. Hartman, Esq., George W. Lewis, Esq., Edwin F. Jones, Esq., and Wm. H. Sawtelle, Esq., appearing as counsel for the plaintiffs, and Eugene S. Ives, Esq., and S. L. Pattee, Esq., for the defendants. Argument of the respective counsel was had and the matter being fully submitted to the court, and the court being fully advised in the premises, does overrule said demurrer.

This matter came on this day regularly to be heard upon the motion of the defendants herein for judgment on the pleadings herein Francis M. Hartman, Esq., George W. Lewis, Esq., Edwin F. Jones, Esq., and Wm. H. Sawtelle, Esq., appearing as counsel

for plaintiffs, and Eugene S. Ives, Esq., and S. L. Pattee, Esq. for the defendants. Argument of the respective counsel was had and the matter being fully submitted to the court, and the court being fully advised in the premises, does deny said motion.

97 This case came on this day regularly for trial before the court sitting without a jury, a jury trial having been expressly waived by the respective parties hereto, Francis M. Hartman, Esq., George W. Lewis, Esq., Edwin F. Jones, Esq., and Wm. H. Sawtelle, Esq., appearing as counsel for the plaintiff, and Eugene S. Ives, Esq., and S. L. Pattee, Esq., for the defedenants, and both parties answered ready for trial.

Whereupon the plaintiff maintained the issues on her part and called as a witness the following named persons, to-wit, Mary Nielsen, the plaintiff and L. B. Lewis, who were duly sworn, examined and cross-examined according to law, and also introduced certain documentary evidence.

MARCH 31, 1908.

[Title of Cause.]

This cause having been continued from yesterday's session of this court, come now the same parties hereto and the further trial of the case proceeds as follows:

The plaintiff further to maintain upon her part the issues herein, recalled as a witness Albert Steinfeld, one of the defendants, who was further examined and cross-examined according to law,

98 and also introduced certain documentary evidence in connection with the cross-examination of Albert Steinfeld.

APRIL 1, 1908.

[Title of Cause.]

This cause having been continued from yesterday's session of the court, come now the same parties hereto, and the further trial of the case proceeds as follows, to-wit:

The plaintiff further to maintain upon her part the issues herein, recalled as a witness Albert Steinfeld, who was further examined and cross-examined according to law, and also called as a witness Malcolm Cochran, George Lewis, J. N. Curtis and S. M. Franklin who were duly sworn, examined and cross-examined and also recalled as a witness Mary Nielsen, the plaintiff, who was further examined and cross-examined, and also introduced certain documentary evidence, and thereupon the plaintiff rested her case. The defendants then to maintain upon their part the issues herein called as a witness E. T. Jones, who was duly sworn, examined and cross-examined, and also introduced certain documentary evidence.

99 APRIL 2, 1908.

[Title of Cause.]

This case having been continued from yesterday's session of this court, come now the same parties hereto, and the further trial of the cause proceeds as follows:

The defendants further to maintain upon their part the issues herein, recalled as witnesses the following named persons to-wit: J. N. Curtis and Albert Steinfeld, who were further examined and cross-examined, and also introduced certain documentary evidence, and thereupon the defendants rested their case.

April 3, 1908.

[Title of Cause.]

This case having been continued from yesterday's session of this court, come now the same parties hereto, and the further trial of the case proceeds as follows:

Argument of the respective counsel was had. Whereupon it was ordered that the plaintiff be given seven days from this date in which to file copies of such portions of the books of L. Zeckendorf & Co., and of the Nielsen Mining and Smelting Company as they desire to put in evidence; and it was ordered that the defendant be given five days thereafter in which to file copies of such portions of
100 such books as they desired to put into evidence; and thereupon this case shall be fully submitted to *to* the court and by the court taken under advisement.

July 30, 1908.

[Title of Cause.]

This cause having been tried, argued and fully submitted at a previous session of the present term of this court, and the court being fully advised in the premises, it is

Ordered that judgment be entered herein in favor of the plaintiff, Mary Nielsen, as administratrix of the estate of Carl S. Nielsen, deceased, and against the defendant, Albert Steinfeld, for the sum of twenty-three thousand three hundred dollars ($23,300) with interest thereon at the rate of six per cent. per annum from January 20, 1904.

And it is further ordered that judgment be entered herein in favor of the plaintiff, Mary Nielsen, administratrix of the estate of Carl S. Nielsen, deceased, and against the defendants decreeing that the three hundred (300) shares of the capital stock of the defendant corporation described in the complaint herein is the property of the said plaintiff, Mary Nielsen, administratrix of the estate of Carl S. Nielsen, deceased.

101 October 24, 1908.

[Title of Cause.]

By consent of counsel for the respective parties hereto, and it appearing to the Court that there is good cause therefor, it is

Ordered that the motion of defendants for a new trial herein be, and the same is now continued for the term.

This matter came on this day regularly to be heard upon the motion of the defendants for additional findings filed herein on this

day, Edwin F. Jones, Esq., appearing as counsel for the plaintiff, and S. L. Pattee, Esq., appearing for the defendant.

Argument of the respective counsel was had, and the matter being fully submitted to the court, and the court being fully advised in the premises, does deny the motion.

OCTOBER 29, 1908.

[Title of Cause.]

This matter came on this day regularly to be heard upon the motion of the defendants for a new trial herein, Wm. H. Sawtelle, Esq., Edwin F. Jones, Esq., and Francis M. Hartman, Esq., appearing as counsel for the plaintiff, and Eugene S. Ives, Esq., for the defendants, and said matter being fully submitted to the
102 court without argument, and the court being fully advised in the premises, does overrule said motion.

Come now the defendants herein and except to the ruling of the court in rendering a judgment in favor of the plaintiff, and in overruling their motion for a new trial herein, and give notice of appeal to the Supreme Court of this territory.

It is ordered that execution be stayed herein upon the defendants filing a supersedeas bond in the sum of eighty thousand dollars ($80,000).

103 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

MARY NIELSEN, Administratrix of the Estate of Carl S. Nielsen, Deceased, and Mary Nielsen in Her Own Personal Right, Plaintiff,

vs.

ALBERT STEINFELD and THE NIELSEN MINING & SMELTING COMPANY, a Corporation, Now Known as and Called The Silver Bell Copper Company, Defendants.

Bond.

Know all men by these presents, That we, Albert Steinfeld and the Silver Bell Copper Company, a corporation, as principals, and Epes Randolph and Leo Goldschmidt as sureties are held and firmly bound unto Mary Nielsen, Administratrix of the estate of Carl S. Nielsen, deceased, and said Mary Nielsen, in her own personal right, in the sum of Eighty thousand dollars ($80,000.00), lawful money of the United States of America, to be paid unto the said Mary Nielsen, Administratrix of the estate of Carl S. Nielsen, deceased, and said Mary Nielsen in her individual right, and her successors, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Given under our hands and the corporate seal of said
104 Silver Bell Copper Company, this 12 day of November, 1908.

The condition of this obligation is such that

Whereas, on the 30th day of July, 1908, a judgment was rendered and entered in the above named court in the above entitled action in favor of the said Mary Nielsen, administratrix of the estate of Carl S. Nielsen, and Mary Nielsen in her own personal right, and against the said Albert Steinfeld and the Nielsen Mining and Smelting Company, a corporation, now known as and called the Silver Bell Copper Company, a corporation, in and by which judgment it was adjudged and decreed that a certain contract bearing date June 29th, 1900, in relation to three hundred shares of stock in said Silver Bell Copper Company, and a certain bill of sale of said three hundred shares of stock, bearing date June 29th, 1900, and a certain transfer and assignment of the same and all contracts and writings connected therewith and pertaining thereto, and certain receipt dated January 23, 1904, be and the same were thereby rescinded, set aside, canceled and declared void and of no effect, and the said Mary Nielsen as such administratrix was held and declared to be the owner of said stock, and the said Albert Steinfeld was ordered and directed to transfer and deliver to said Mary Nielsen as such administratrix said three hundred shares of stock,
and the said Silver Bell Copper Company and its officers were
105 ordered and directed to properly and legally transfer said stock on the books of said corporation to said Mary Nielsen as such administratrix, and to issue to her as such administratrix a new certificate therefor, and in and by which judgment it was further adjudged and decreed that said Mary Nielsen as such administratrix have and recover of the defendant Albert Steinfeld the sum of Twenty-three thousand three hundred dollars ($23,300.) with interest thereon from the 20th day of January, 1904, to the date of such judgment, at the rate of six per cent per annum, which interest amounted at the date of the said judgment to the sum of Six thousand three hundred and twenty-nine dollars and eighty-three cents ($6,329.83), making a total of Twenty-nine thousand six hundred and twenty-nine dollars and eighty-three cents ($29,629.83) and the further sum of Fifty-five and 05/100 dollars ($55.05), costs of said action; and

Whereas the said Albert Steinfeld and the said Silver Bell Copper Company, a corporation, have appealed from the said judgment to the Supreme Court of the Territory of Arizona, and

Whereas, an order of the above named court was duly made and entered fixing the amount of the bond and undertaking to be given upon such appeal to stay the execution of said judgment pending such appeal, in the sum of Eighty thousand dollars,

106 Now, therefore, if the said Albert Steinfeld and the Silver Bell Copper Company, a corporation, appellants in said Supreme Court shall prosecute their said appeal with effect, and in case the judgment of the appellate court shall be against them, that they shall perform its judgment, sentence or decree and pay all such damages as may be awarded against them upon the appeal,

and shall pay to the said Mary Nielsen as administratrix of the estate of the said Carl S. Nielsen, deceased, and Mary Nielsen in her own personal right all damages which she may sustain by the not doing the particular acts and things directed to be done by the judgment from which said appeal is taken and shall pay all costs which have accrued in the court below or which may accrue in the appellate court, then this obligation shall be void, otherwise to remain in full force and effect.

[SEAL.] ALBERT STEINFELD,
SILVER BELL COPPER COMPANY,
By J. N. CURTIS, *President;*
R. K. SHELTON, *Secretary.*
EPES RANDOLPH,
LEO GOLDSCHMIDT.

TERRITORY OF ARIZONA,
County of Pima, ss:

Epes Randolph whose name is subscribed as surety to the within bond, being duly sworn, deposes and says: that he is a resi-
107 dent and freeholder within the Territory of Arizona, that he is worth the sum of Eighty thousand dollars, over and above all his just debts and liabilities, and over and above all property exempt from execution and forced sale.

EPES RANDOLPH.

Subscribed and sworn to before me this 12 day of November, A. D., 1908.

My commission expires May 9, 1911.

JOSIE B. HENDERSON,
[SEAL.] *Notary Public.*

TERRITORY OF ARIZONA,
County of Pima, ss:

Leo Goldschmidt whose name is subscribed to the within bond, being duly sworn, deposes and says: that he is a resident and freeholder within the Territory of Arizona; that he is worth the sum of Eighty thousand dollars, over and above all his just debts and liabilities, and over and above all property exempt from execution and forced sale.

LEO GOLDSCHMIDT.

Subscribed and sworn to before me this 12 day of November, A. D., 1908.

My commission expires May 9-1911.

JOSIE B. HENDERSON,
[SEAL.] *Notary Public.*

108 Endorsements: No. 3883 District Ct. Pima County. Mary Nielsen, Adm'x, &c., Plaintiff vs. Albert Steinfeld, et al. Defendants. Supersedeas Bond Approved and filed November 13, 1908. Allan B. Jaynes, Clerk. Approved November 17, 1908 John H. Campbell, Judge.

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

MARY NIELSEN, Administratrix of the Estate of Carl S. Nielsen, Deceased, and Mary Nielsen in Her Personal Right, Plaintiff,

vs.

ALBERT STEINFELD and THE NIELSEN MINING & SMELTING COMPANY, Now Called the Silver Bell Copper Company, Defendants.

Cost Bond.

Know all men by these presents, That we, Albert Steinfeld and Silver Bell Copper Company, a corporation as principals, and Hugo J. Donau and L. Rosenstern as sureties, are held and firmly bound unto Mary Nielsen administratrix of the estate of Carl S. Nielsen, deceased, and the said Mary Nielsen in her personal right in the sum of Five Hundred Dollars, lawful money of the United States to be paid unto the said Mary Nielsen administratrix of the estate of Carl S. Nielsen, deceased, and the said Mary Nielsen in
109 her personal right, her heirs, executors, administrators, successors or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally, firmly by these presents.

Given under our hands this 12 day of November, 1908.

The condition of this obligation is such that

Whereas, on the 30th day of July, 1908, a judgment was rendered in the above entitled court and in the action above named, in and by which judgment it was adjudged and decreed that the plaintiff Mary Nielsen as administratrix of the estate of Carl S. Nielsen, deceased, do have and recover of and from the defendant Albert Steinfeld the sum of Twenty-three Thousand Three Hundred Dollars with interest thereon since the 20th day of January, 1904, amounting in all at the date of said judgment to the sum of Twenty-nine Thousand Six Hundred and Twenty-nine and 83/100 Dollars, and in and by which judgment it was further adjudged and decreed that the plaintiff, Mary Nielsen as such administratrix was the owner of three hundred (300) shares of the capital stock of the Silver Bell Copper Company, a corporation, and the said Albert Steinfeld was directed in and by said judgment to sign, transfer and set over to said Mary Nielsen as such administratrix all of said shares of stock and all certificates and instruments representing the same; and the said defendant corporation was ordered and directed to transfer
110 and cause the same to be transferred to said Mary Nielsen as such administratrix upon the books of said corporation, and in and by which judgment it was further adjudged and decreed that the plaintiff Mary Nielsen do have and recover the further sum of Fifty-five and 5/100 Dollars, costs of said action, and

Whereas, the above named defendants have appealed from said judgment to the Supreme Court of the Territory of Arizona,

Now therefore, if the said Albert Steinfeld and Silver Bell Copper Company, a corporation, appellants in said Supreme Court shall prosecute their said appeal with effect and shall pay all costs which have accrued in the Court below or which may accrue in the appellate Court, then this obligation shall be void otherwise to be and remain in full force and effect.

[SEAL.] ALBERT STEINFELD,
SILVER BELL COPPER COMPANY,
By J. N. CURTIS, *President;*
R. K. SHELTON, *Secretary.*
HUGO J. DONAU,
L. ROSENSTERN.

TERRITORY OF ARIZONA,
County of Pima, ss:

Hugo J. Donau and L. Rosenstern, whose names are subscribed as sureties to the within bond, being severally dully sworn, each for himself, deposes and says: that he is a resident and freeholder
111 within the Territory of Arizona; that he is worth the sum of Five Hundred Dollars, over and above all his just debts and liabilities, and over and above all property exempt from execution and forced sale.

HUGO J. DONAU.
L. ROSENSTERN.

Subscribed and sworn to before me this 12th day of November, A. D. 1908.

My commission expires May 9, 1911.

[SEAL.] JOSIE B. HENDERSON,
Notary Public.

Endorsements: No. 383. District Ct., Pima County. Mary Nielsen, Admx. &c., Plaintiff, vs. Albert Steinfeld et al., Defendants. Cost Bond. Filed November 13, 1908. Allan B. Jaynes, Clerk. I have fixed the probable amount of costs both in the appellate Court and the Court below at the sum of $250.00 and hereby approve the within Bond this 13th day of November, 1908. Allan B. Jaynes, Clerk District Court.

112 And on the same day, to-wit: the fourteenth day of December, 1908, there was filed in the Clerk's office of said Court in said entitled cause the following papers from the District Court: Stipulation, 4 Subpœnas, Plaintiff's exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, Plaintiff's offer No. 25 and 33, refused, Defendants' exhibits A, B, C, D, E, F, Pracipe, Agreement, 2 Extracts from books of L. Zeckendorf & Co., Stipulation for Continuance, Stipulation Continuing case for the term, 5 Subpœna Pracipes, Mem-orandum of Costs and Disbursements, Objections to Cost Bill, Notice, Notice of filing Reporter's Transcript of Evidence,

and Reporter's Transcript of Evidence, copies of which are omitted from the transcript by direction of attorneys for Appellant.

And on to-wit; the twelfth day of January, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

113 Title of Cause.

At this day, on motion of Mr. S. L. Pattee, attorney for appellants herein, it is ordered that oral argument be granted in this cause and the hearing set for Monday, January 18, 1909.

And on to-wit: the eighteenth day of January, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, on motion of Mr. F. M. Hartman, attorney for appellees herein, it is ordered that the first part of appellees' motion to strike and objections to appellants' motion to amend assignment of errors, be withdrawn.

And on the same day to-wit: the eighteenth day of January, 1909, being one of the regular juridical days of the January term of said court, 1909, the following other order was had and entered of record in said cause in words and figures following, to-wit:

114 Title of Cause.

At this day it is ordered by the Court that appellees' Motion and Objections to the consideration of Assignments of Error set forth and specified in appellants' brief, be submitted.

And on the same day to-wit: the eighteenth day of January, 1909, being one of the regular juridical days of the January Term of said court, 1909, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

At this day, comes W. H. Sawtelle, attorney for appellee, and argues the Motion and Objections to the consideration of Assignments of error set forth and specified in appellants' brief.

Whereupon, the Court ordered that said Motion and Objections of appellee be and the same is hereby denied.

And on the same day to-wit: the eighteenth day of January, 1909, being one of the regular juridical days of the January Term of said court, 1909, the following other order was had and entered of record in said cause in words and figures following, to-wit:

115 Title of Cause.

This cause coming on at this time for hearing, was argued by Mr. Eugene S. Ives for appellants, the time for adjournment having arrived, it is ordered by the Court that argument be continued until two o'clock this afternoon.

And on the same day to-wit: the eighteenth day of January, 1909, being one of the regular juridical days of the January Term of said court, 1909, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

This cause coming on at this time for hearing, argument was resumed by Mr. E. S. Ives for appellants and Mr. W. H. Sawtelle for appellee, and the time for adjournment having arrived, it is ordered by the Court that the argument be continued until to-morrow morning at 10 o'clock.

And on to-wit: the nineteenth day of January, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

116 Title of Cause.

The hearing in this cause having been continued from yesterday, argument was concluded by Mr. Edw. F. Jones for appellee, and cause ordered submitted.

And on the same day to-wit: the nineteenth day of January, 1909, being one of the regular juridicial days of the January term of said court, 1909, the following order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

At this day, on motion of Mr. E. S. Ives, attorney for appellants herein, it is ordered by the Court that he be granted until Friday, January 22, 1909, within which to file brief.

And on to-wit: the twenty-sixth day of January, 1909, being one of the regular juridicial days of the January term of said court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Ttitle of Cause.

At this day, on motion of Mr. E. S. Ives, attorney for appellant herein, it is ordered by the Court that the time heretofore
117 granted appellants within which to file reply brief be, and the same is hereby, extended one week.

And on to-wit: the twentieth day of March, 1909, there was filed in the clerk's office of said court in said entitled cause a certain Opinion in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1088.

ALBERT STEINFELD and the NIELSEN MINING & SMELTING COMPANY, a Corporation, Now Known as and Called the Silver Bell Copper Company, a Corporation, Appellants,

vs.

MARY NIELSEN, Administratrix of the Estate of CARL S. NIELSEN, Deceased, and the Said MARY NIELSEN IN HER OWN PERSONAL RIGHT, Appellee.

Appeal from the District Court of Pima County.

Hon. JOHN H. CAMPBELL, *Judge:*

This action was brought against the appellants in the district court of Pima county in June, 1905, by the appellee, Mary Nielsen, individually, and as the administratrix of the estate of Carl S. Nielsen, deceased. Among other things, the complaint prays
118 that a certain sale made by Carl S. Nielsen and Mary Nielsen to Albert Steinfeld of 300 shares of the capital stock of the defendant corporation should be set aside as fraudulent, and the plaintiff have judgment for said stock and for $33,000.00 dividend theretofore paid thereon and received by said Steinfeld. Judgment was rendered in the lower Court decreeing the plaintiff to be the owner of the said stock, and that she recover from Steinfeld the amount of the dividend less the amount of the purchase price paid by Steinfeld. From that judgment an appeal was taken to this court.

The court found the facts as follows:

I.

That the plaintiff, Mary Nielsen, is the widow of the late Carl S. Nielsen, who died intestate on or about the 5th day of March, 1901, in Pima County, Arizona Territory, leaving as his sole heirs at law, his said widow, Mary Nielsen, and their four children, Hilda S., Gwynne E., Ian W. and Richard H. Nielsen, then aged thirteen, eleven, nine and seven years respectively: That on the 5th day of June, 1903, the Probate Court of said Pima County, granted Letters

of Administration on the Estate of the said Carl S. Nielsen, and said Mary Nielsen was by the said Court duly and legally appointed administratrix of his estate, and duly qualified as such, and since said
5th day of June, 1903, the said Mary Nielsen has been and
119 now is the duly qualified and acting administratrix of the estate of the said Carl S. Nielsen; and that the said Carl S. Nielsen in his life time was a citizen and resident of the County of Pima, Territory of Arizona.

II.

That the defendant, Albert Steinfeld is a citizen and resident of the County of Pima, Territory of Arizona, and resides in the City of Tucson. That the defendant, the Silver Bell Copper Company, is a corporation duly organized and existing under the laws of the Territory of Arizona; that said corporation was organized on the 14th day of January, 1899, under the name of the Nielsen Mining & Smelting Company; and that, by resolution of the Board of Directors, made on or about the 14th day of January, 1901, its name was changed to the Silver Bell Copper Company, and since that date and up to the present time the said corporation has conducted its business under and by the name of the Silver Bell Copper Company.

III.

That about the end of the year 1897, said Carl S. Nielsen leased from Albert Steinfeld, as Trustee for Julia Zeckendorf, the then unpatented mining claim, situated in the Silver Bell Mining District of Pima County, Arizona, known and called the Old Boot Mine. That said lease was oral and terminable at will.

That under said lease the said Nielsen was to have the
120 privilege of working said mine and extracting and shipping and selling ores therefrom on the payment to said Steinfeld as such Trustee of a royalty of $1.25 per ton on all ore extracted and shipped or smelted by him, and the said Nielsen was to do the annual assessment work on said claims.

That soon thereafter said Nielsen took charge of said mine and proceeded to work the same under said lease and extracted therefrom and smelted at the smelter erected thereat and shippd large quantities of ores; and during the time the said Nielsen was so operating he obtained his supplies from Wheeler & Perry, who were engaged in the mercantile business in the City of Tucson, Arizona, and shipped the product of such mine through the bank.

While Nielsen was so engaged in conducting his said business, one Hugo J. Donau who was in the employ of L. Zeckendorf & Co., a firm composed of L. Zeckendorf & Albert Steinfeld, on behalf of said firm, proposed to said Nielsen that then and thereafter the products of said mine be shipped through the firm of L. Zeckendorf & Co., who would make advances and furnish supplies to be used in the working of said mines, the same to be paid for out of the product of said mine-. Said proposition was agreed to and accepted by

said Nielsen, and then and thereafter all the product of said mines was so shipped and certain supplies were furnished him by said Zeckendorf & Co., and the proceeds of said pro- t were collected by said firm and applied thereon. This agree- nt was not by its terms to extend for any specific time.

That at the time the said Donau made said proposition he was in employ of and acting on behalf of said firm and at such time l Albert Steinfeld was the managing partner of said firm and charge of its affairs.

That the prospect of said mine grew better as said Nielsen con- ued to work the same under said lease.

That during the time said Nielsen operated said mine under said se and prior to the organization of the Nielsen Mining and Smelt- Company he developed large quantities of ore in said Old Boot ne, and erected and used a smelter for the treatment of the ores refrom, and expended large sums of money in developing said ne and in the erection of said smelter.

That on the 14th day of January 1899, the said Nielsen was in- ted to the following persons in the following sums, to-wit:

Zeckendorf & Co.	$16,608.27
Zeckendorf & Co.	826.25
eeler & Perry	2,027.27
T. Etchels	110.00
F. Schumacher	160.00
J. Corbett	75.00
rdiner, Worthen & Goss	438.85
Dobson	20.00
ployees	1,221.12
Total	$22,886.86

and the said Nielsen had on hand at the mine, property, and had in transit to market, products of said mine and smelter, ich were valued by the said Nielsen and the said Curtis represent- the firm of L. Zeckendorf & Co., and the said Steinfeld, at a n slightly in excess of the debts owing by the said Nielsen, in- ding all debts due by him to the said firm of L. Zeckendorf & Co.

IV.

That while the said Nielsen was operating said mine under said se the said Albert Steinfeld procured J. H. Curtis to go out and amine the said mine and after such examination the said Curtis posed to the said Nielsen to organize a corporation to take charge an- operate said mine and smelter belonging to said Nielsen, at as a result of said proposal and the negotiations which followed the Nielsen Mining and Smelting Company was, on the 14th day January, 1899, duly organized under the laws of the Territory Arizona. That the capital stock of said company was $25,000.00, ided into one thousand shares of the par value of $25.00 each, ich said stock was fully paid up and non assessable. That the

incorporators of said corporation were J. N. Curtis, R. K. Shelton and C. S. Nielsen, and that upon the organization of said company the said J. N. Curtis, R. K. Shelton and C. S. Nielsen became
123 the sole directors thereof, and the said J. N. Curtis was elected President and Treasurer of said company, the said R. K. Shelton was elected Secretary of said Company, and the said Nielsen was elected Vice President of the said Company.

That at the first meeting of the board of Directors of said Nielsen Mining & Smelting Company, held January 14th, 1899, the said Nielsen made a proposition to the company to sell to it his smelting plant on or near the Mammoth Millsite, or Old Boot Mine, all the machinery, tools and appliances and personal property owned and used by him in connection with said smelting plant, and also all leases and licenses to work said mines and mining claims in the Silver Bell Mining District which he then had, in consideration of the corporation issuing to him nine hundred and ninety-seven shares of its capital stock, full paid and non-assessable, and also upon the company assuming and paying an indebtedness to various persons, a list of which he presented and which is the list set out in Finding III, which said indebtedness was secured by copper bullion in transit to market through the firm of L. Zeckendorf & Co., and in which he agreed to assign to the company his equity.

That the said proposition was duly accepted by the corporation and the said Nielsen duly transferred to the corporation the property mentioned in his offer, and received a certificate to the
124 effect that he was entitled to receive therefor nine hundred and ninety-seven shares of the capital stock of said corporation.

That the President reported a list of debts assumed by the said corporation, which said list is set out in Finding III, amounting to $22,886.86, and reported that the said sum of the indebtedness was secured by large shipments of copper bullion in transit.

That by motion duly made the board of directors of said corporation agreed to accept the report of the President concerning said proposal by the said Nielsen and its acceptance by the President and his actions in the premises were ratified and confirmed.

It was also resolved by the Board of Directors that the corporation take immediate charge and control of the smelting plant and property purchased, and that it continue the mining operations thereat.

On motion it was unanimously agreed that Carl S. Nielsen be elected Superintendent and act as such for a period of one year, and Mr. Nielsen accepted the position.

V.

That after the organization of said company it was agreed that the stock of said corporation should be issued as follows:

500 shares to L. Zeckendorf & Co., a partnership composed of Albert Steinfeld and Louis Zeckendorf, and a cer-
125 tificate of 499 shares was issued to said L. Zeckendorf & Co., and 1 shares was issued to said Shelton.

170 " " J. N. Curtis.

30 " " Albert Steinfeld as Trustee for Julia Zeckendorf.

300 " " Carl S. Nielsen.

and certificates of stock were duly issued to the parties named above for the amounts above stated.

That immediately after the said Nielsen was elected Superintendent he took charge of the property of the corporation, and, subject to the control of the said Curtis, who as President of said corporation had general control thereof, conducted the mining and smelting operations of the company for about one year, and during the time he so operated said mine large quantities of valuable ores were extracted therefrom, smelted and the product thereof shipped to market through the firm of L. Zeckendorf & Co., of which the said Steinfeld was the managing partner, and other bodies of ore developed.

That after the organization of said corporation all the products of the mine and smelter were turned over to L. Zeckendorf & Co., and all moneys, goods and supplies were obtained from the said firm of L. Zeckendorf & Co.

That during this time Albert Steinfeld was the active and managing partner of L. Zeckendorf & Co., and as such had absolute
126 control over the credit extended by said firm to the Nielsen Mining & Smelting Company, and as a member of said firm he managed, controlled and voted the stock owned by said firm in said corporation, and by means of the stock owned by said firm, and the stock held by him as trustee for Julia Zeckendorf, he controlled a majority of the stock of said Nielsen Mining & Smelting Company, and though neither an officer or director of said company he dominated and controlled the same.

The share of stock standing in the name of R. K. Shelton belonged to and was the property of L. Zeckendorf & Co., and the said Shelton was but the representative of that firm upon the Board of Directors of said corporation and was dominated and controlled by the said Albert Steinfeld.

J. N. Curtis was the employee of the said firm of L. Zeckendorf & Co., and because of the business relations existing between the said Steinfeld and the said Curtis the said Curtis was largely influenced in his actions as a director of said corporation by the said Steinfeld.

That the power of the said Albert Steinfeld over the Nielsen Mining & Smelting Company, and over the directors and officers thereof up to the purchase of the stock of C. S. Nielsen therein, on June 29, 1900, arose out of and was because of the fact that the said company was largely in debt to L. Zeckendorf & Co., and that
127 L. Zeckendorf & Co. and the said Steinfeld as Trustee for William and Julia Zeckendorf held a majority of the said stock of said company, and said Steinfeld as the manager of said firm of L. Zeckendorf & Co., having the power to control said indebtedness and to vote the stock of said L. Zeckendorf & Co., and as Trustee for William and Julia Zeckendorf, having the power to vote their stock, and because of the fact that the said J. N. Curtis and R. K. Shelton were employees of the firm of L. Zeckendorf & Co., and under the direction and control of said Steinfeld, and because of the fact that the said Nielsen had all of his means tied up in the said company and was without means to secure the necessary supplies and advances to operate said mine and smelter, and because

all of the product of said mine and smelter was turned over to the firm of L. Zeckendorf & Co., who determined the disposition thereof, and which firm collected all the proceeds thereof.

And that the said Albert Steinfeld as managing partner of L. Zeckendorf & Co. had the power to determine whether at any time further credit should be extended to said company and had the power and legal right at any time to cease extending credit to the said company. That the said firm of L. Zeckendorf & Co. was under no obligation at any time to extend any further credit to the said corporation, and had the legal right at any time to cease giving further credit and to enforce the collection of the amount owing to said L. Zeckendorf & Co. by said corporation.

128 VI.

That during the year 1899, large amounts of money were expended in developing and working said mine, and in the purchase and erection of machinery, buildings and other improvements on said mine and smelter, and thereby substantial quantities of valuable ore were discovered and developed therein, and the value of said mine was substantially increased thereby.

That shortly after the organization of said corporation an option was granted by Albert Steinfeld as Trustee for William and Julia Zeckendorf to the said company, giving the said company the right to purchase the Old Boot Mine for the sum of Twenty-five Thousand Dollars, payable in quarterly payments of Twenty-five Hundred Dollars each, and providing that in the event of failure to make payment of each such installment at the time it became due the said option and right thereunder should be forfeited. And that at the time of the shutting down of said smelter and the discharge of said Nielsen as Superintendent, as hereinafter stated there was still unpaid on said purchase price the sum of Fifteen Thousand Dollars. Said last mentioned sum was after July 1st, 1900, paid by said company and said mines thereby became the property of said company, and was owned by it at the time of the sale thereof to the Imperial Copper Company.

128½ That during the months of October, November and December, 1899, and January, 1900, the smelter of the Company was in active operation and was producing copper at a material and considerable profit, and the sale of the product of said smelter was materially reducing the debt owed by said company to the firm of L. Zeckendorf & Co. The exact amount of profit during the time is not shown by the evidence.

VII.

That some time in the year 1899 the said Steinfeld determined to get rid of Nielsen as a stockholder in said company, and on January 3, 1900, the said Steinfeld wrote the following letter to Nielsen:

"Mr. C. S. Nielsen, Red Rock, Ariz.

DEAR SIR: In view of the very large indebtedness existing against the company, and the fact that little headway is being made towards

its liquidation. I have decided after careful consideration to close down both mine and smelter when the present coke cupply is exhausted, which would be about the 15th or 20th inst. You will please make all provision to this end incurring no larger outlay than is absolutely necessary for such articles as wood, ore and other supplies except what would be required for the purposes stated. The present good showing in the mine may place us in a position to sell the property at an advantageous price and this will be my
129 aim to do at the very earliest possible moment. It will also be wise for you to advise George in that no credits be extended to anyone beyond what can be collected during the time contemplated, and that every effort be made to collect all outstandings pending to date.

Yours truly,

ALBERT STEINFELD."

That at and prior to the time the said Steinfeld wrote said letter the said mine and smelter of said company were running at a considerable profit, and the debt due from said company to the firm of L. Zeckendorf & Co., was being substantially and continually reduced, and that these facts were known to the said Steinfeld at the time he wrote and sent said letter to Nielsen.

That at the time he wrote said letter the said Steinfeld had made up his mind to shut down said mine and smelter for the purpose of acquiring the interest of Nielsen in said corporation, and for the purpose of acquiring a certain adjoining group of mines known as and hereinafter referred to as the English Claims before proceeding with the further development of the Old Boot Mine, and wrote said letter in pursuance of his said purpose.

That the said English group of mines adjoined the said Old Boot mine, and if acquired for the corporation would greatly add to the value of the stock held by the said Nielsen in said corpora-
130 tion, all of which was known to said Steinfeld; that at the time the said Steinfeld wrote the said letter dated January 3rd, 1900 and at the time of the discharge of the said Nielsen as Superintendent as hereinafter found, and at the time Steinfeld acquired the stock held by the said Nielsen as hereinafter found, the said Steinfeld intended and expected that the said corporation would acquire the said English Group of mines, but did not disclose said fact to the said Nielsen.

That on or about the 1st day of February, 1900, the said Steinfeld, although he was neither a director or officer of said company, undertook to discharge said Nielsen from his position as Superintendent of said Company, and the said Nielsen refused to be discharged by the said Steinfeld. That at the time said Steinfeld undertook to discharge said Nielsen, he had not been authorized by the Board of Directors to do so, and had not consulted with said Board, and the said Board had not in any way authorized anyone to discharge the said Nielsen as such superintendent.

That subsequently the directors Curtis and Shelton, for the purpose of making it appear from the records of the corporation that

said Steinfeld had authority to discharge the said Nielsen, caused to be entered upon the corporate minutes of said company, as of the date of February 1st, 1900, the following resolutions:

"On motion duly seconded it was resolved that C. S. Nielsen
131 be and he hereby is discharged as Superintendent of this corporation, and his salary as such be discontinued from this date."

Whereas, in truth and in fact the said resolution was not put upon the minutes and no meeting was held on February 1st, 1900, and not until some days thereafter, on or about the 10th day of March, 1900.

And that thereafter, on or about the 10th day of March, 1900, the directors of the said corporation, at a meeting at which J. N. Curtis and R. K. Shelton only were present, but of which meeting said Nielsen had notice, passed the following resolution:

"On motion duly seconded the action of the Board of Directors at its meeting held February 1st, 1900, in discharging said C. S. Nielsen as its Superintendent is ratified, approved and confirmed.

"On motion it was unanimously resolved that the said C. S. Nielsen be and he is hereby discharged as Superintendent of the Company."

That at the time above last mentioned resolution of March 10th, 1900, was passed, reciting the ratification of the action of the meeting of February 1st, 1900, the said Curtis and the said Shelton well knew that no such meeting of the Board of Directors had been held on February 1st, 1900.

That on or about the 19th day of February, 1900, the said
132 Nielsen, believing he had been regularly discharged as such superintendent by the Board of Directors, and believing the statements of said Steinfeld in his letter of January 3, 1900, and having all his means invested in said company, and the existing supply of coke then at the smelter being exhausted, and the said Nielsen being powerless to obtain supplies to run said mine and smelter, and all the assets of the said corporation being under the control of the said Steinfeld, did shut down the said mine and smelter and cease to be in possession and control thereof.

VIII.

That in January, 1900, said Steinfeld caused the development work on said mine to be stopped, the smelter however, was run until sometime in February, 1900, at which time all the coke and supplies necessary for the operation of the smelter and substantially all of the ore which had been developed prior thereto were exhausted, but if the development work had not been stopped by the said Steinfeld, but had been continued during the operation of the said smelter, sufficient ore would have been developed to have kept the smelter continuously supplied. That the said Nielsen at the time of the closing down of the smelter knew the condition of the mine.

That at the time said Steinfeld had such mine shut down he was informed of the value of said Old Boot mine, and of the value of said adjoining properties thereto, and did not shut down said
133 mine and smelter because of the very large indebtedness existing against said company and the fact that little progress

was being made towards its liquidation, or because it was running deeper an ddeeper in debt to said L. Zeckendorf & Co., or because the ore was exhausted, but shut down the same solely and exclusively for the purpose of getting rid of the said Nielsen as a stockholder in said corporation and to acquire his said stock and for the purpose of acquiring the English Group of Mines.

IX.

That after the mine and smelter of the said Nielsen Mining and Smelting Company had been closed down as aforesaid, the said Steinfeld called upon the said Carl S. Nielsen, and proposed to buy his stock in said company and also all interest which the said Nielsen and one Lewis might have to the mines or mining claims situated in said Silver Bell Mining District.

That during the negotiations the said Steinfeld stated to the said Nielsen that if he did not take the offer of the said Steinfeld he would get nothing for his said stock.

That at the time the said Steinfeld was negotiating with the said Nielsen, the said Nielsen was in financial distress and was without means, and this fact was known to the said Steinfeld at the time.

That such negotiations were had on or about the
134 20th day of June, 1900. That the said Nielsen and the said Lewis executed to the said Steinfeld a quit-claim deed to the said Clarence and Identical Mining Claims for a recited consideration of Two Thousand Dollars, and on the same day and at the time of the execution of the said agreement hereinafter set forth, said Carl S. Nielsen and Mary Nielsen executed and delivered to the said Steinfeld a bill of sale by the terms of which they sold, assigned and transferred unto the said Steinfeld the said three hundred shares of stock, and also signed and executed upon the back of the certificate representing such stock an assignment and transfer thereof to the said Steinfeld, and delivered said certificate with such assignment and transfer endorsed thereon to the said Steinfeld, and a contract was signed by Albert Steinfeld, Nielsen Mining & Smelting Company, by J. N. Curtis, President, Mary Nielsen and Carl S. Nielsen, but was never acknowledged by said Steinfeld or by said Curtis as President on behalf of the Nielsen Mining & Smelting Company. That the said deed, transfer and contract were prepared by S. M. Franklin, the attorney of the Nielsen Mining & Smelting Co., at the instance and upon the information furnished by the said Steinfeld, and was sent by Steinfeld to be signed and ackowledged before W. F. Cooper by Carl S. and Mary Nielsen.

That upon the execution and delivery of said deed, the said
135 Steinfeld paid to Nielsen and to said Lewis the sum of two thousand dollars in cash as a consideration for said Clarence and Identical mining claims, which was equally divided between said Carl S. Nielsen and said Lewis, as the joint owner- of said Clarence mine.

That said contract is in the words and figures as follows, to-wit:

"This agreement made the 29th day of June, 1900, between Albert Steinfeld and the Nielsen Mining & Smelting Company, a

corporation organized and existing under the laws of the Territory of Arizona, parties of the first part, and Carl S. Nielsen, and Mary Nielsen, his wife, parties of the second part, witnesseth:

That the parties of the first part in consideration of the transfer by said Carl S. Nielsen to Albert Steinfeld of the three hundred shares of the capital stock of the Nielsen Mining and Smelting Company, and in consideration of the parties of the second part executing their deed of quit claim and release of their interest in and to certain mining claims as fully appear from certain quit claim deed executed by the parties of the said second part and one L. B. Lewis, to said Albert Steinfeld, and in further consideration of the sum of one dollars by the said parties of the second part in hand paid to the parties of the first part, receipt whereof is hereby acknowledged, do hereby agree that they will pay unto the parties of the second part the sum of ten thousand dollars, lawful money
136 of the United States, as soon as the Nielsen Mining & Smelting Company will consum-ate a sale of its mining properties which are situated in the Silver Bell Mining District, Pima County, Arizona, such sum to be paid within thirty days after such sale is completed.

Said parties of the first part further agree that in the event that the Nielsen Mining & Smelting Company should commence active operations that then and in that event the net profits which may arise to said company from its said working and shipping and operating shall be applied first to the payment of the debts of said Company, second after said debts are paid said net profits up to the amount of ten thousand dollars shall be paid to the party of the second part, and upon full payment of said sum of ten thousand dollars out of said profits the parties of the first part hereto shall be relieved from all obligations to pay said parties of the second part a like sum of ten thousand dollars, or any part thereof, in the event said company consum-ates or completes a sale of its property as hereinbefore agreed: that is to say in no event shall said parties of the second part be paid more than the sum of Ten Thousand Dollars.

In witness whereof the parties have hereunto placed their hands the day and year first above written.

In triplicate.

137 ALBERT STEINFELD.
NIELSEN MINING & SMELTING CO.,
By J. N. CURTIS, *President*,
MARY NIELSEN,
CARL S. NIELSEN.

TERRITORY OF ARIZONA,
County of Pima, ss:

Before me, William F. Cooper, a Notary Public in and for the County of Pima, Territory of Arizona, on this day personally appeared Carl S. Nielsen and Mary Nielsen, wife of said Carl S. Nielsen, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purpose and consideration therein

expressed, and the said Mary Nielsen, wife of said Carl S. Nielsen, having been examined by me privily and apart from her husband, and having the same fully explained to her, she the said Mary Nielsen acknowledged said instrument to be her act and deed and declared that she had willingly signed the same for the purpose and consideration therein expressed, and that she did not wish to retract it.

Given under my hand and seal of office this 29th day of June, A. D. 1900.

WILLIAM F. COOPER,
Notary Public.

My Commission expires March 13th, 1901."

138 That at the time said Steinfeld entered into negotiations for the purchase of the stock of said Nielsens, and the interest of said Nielsen and said Lewis in said mining claims, and at the time he procured the said Nielsen to sign the said deed, and transfer said stock and enter into and sign the contract above set out, he did not inform the said Nielsen that he had shut down the mine and smelter of said Nielsen Mining & Smelting Company for the purpose of getting rid of the said Nielsen, and for the purpose of acquiring the English claims, and did not inform the said Nielsen that the said Steinfeld had no authority to do so when he attempted to discharge the said Nielsen, and did not inform the said Nielsen that the entry contained in said minute book of the Company was a false entry purporting to have been made therein as a record of a meeting of the directors of said company held about the 1st of February, 1900, and did not inform him that no meeting of the Directors was held on that day, and that the said minute book contained a false record of such pretended meeting.

That the said Nielsen at the time he signed said deeds and executed said contract, and made the said transfer of the stock in the Nielsen Mining & Smelting Company, did not know that the said Steinfeld had shut down said mine and smelter for the purpose of getting rid of Nielsen and acquiring his stock, and did not know that the said mine and smelter had been shut down while the same was making money in order to enable the said Stein-

139 fend to acquire the title to the English Group, and did not know that the said Steinfeld had no authority from the Board of Directors to discharge the said Nielsen, or that the record in the minute book of the company showing his discharge by said board of directors on or about the 1st day of February, 1900, was false, and that no such meeting of the board of directors was ever in fact held, but the said *Nelson* believed that he had been legally and duly discharged and that the said Steinfeld had shut down said mine and smelter for the reasons stated in his letter of January 3, 1900, and acted and relied on such belief.

That the said Nielsen was in financial distress, and was without means to resist the will and direction of the said Steinfeld, and the said Steinfeld knew of the pecuniary condition of the said Nielsen.

That the said contract of June 29th, 1900, was not authorized by

the Board of Directors of the Nielsen Mining & Smelting Company, and that said Curtis signed the same on the part of the Company without any authority of the Board of Directors of said Company at the instance and request of said Steinfeld.

That upon acquiring the said three hundred shares of stock as aforesaid, the said Steinfeld surrendered the certificate standing in the name of Carl S. Nielsen, and there was issued in lieu thereof a certificate for three hundred shares in the name of "Albert
140 Steinfeld, Trustee," and said shares have since remained and now stand on the books of said corporation in the name of "Albert Steinfeld, Trustee."

That neither the said Steinfeld nor the said Curtis made any false representations to the said Carl S. Nielsen or Mary Nielsen, or either of them with reference to the amount of the indebtedness of the Nielsen Mining & Smelting Company to L. Zeckendorf & Co., but said Carl S. Nielsen and Mary Nielsen had at all times the means of ascertaining the amount of the indebtedness of said corporation to L. Zeckendorf & Co., and could with reasonable effort have ascertained the same; and in all the transactions herein set forth neither the said Carl S. Nielsen nor Mary Nielsen relied on any such representations.

XI.

That the English Group of Mines were acquired by the said Steinfeld, and were, in May, 1903, together with the said Old Boot Mine sold for the sum of of Five Hundred and Fifteen Thousand Dollars, and the entire proceeds of the sale became the property of the Silver Bell Copper Company.

That on or about the 20th day of January, 1904, the Board of Directors of the Silver Bell Copper Company declared a dividend of $111.00 per share on the capital stock of said company, and the said Albert Steinfeld Received from the said Silver Bell
141 Copper Company the sum of Thirty-three Thousand Three Hundred Dollars as dividends on the three hundred shares of stock which he had obtained from the said Carl S. Nielsen as above set forth: that the said Steinfeld has kept and retained the said sum of Thirty-three Thousand Three Hundred Dollars, and Claims the same as his own.

That on the 23rd day of January, 1904, the said Steinfeld paid to the said Mary Nielsen the sum of $10,000.00, and received from the said Mary Nielsen a receipt therefor, which said receipt is in the words and figures following, to-wit:

"TUCSON, ARIZONA, *January* 23, 1904.

"Received from Albert Steinfeld the sum of Ten Thousand Dollars ($10,000.00) the same being in full of all claims against Albert Steinfeld and the Nielsen Mining & Smelting Company or the Silver Bell Copper Company, or any or either of them, for all claims or demands which Carl S. Nielsen or Mary Nielsen have or had against the said Steinfeld and the said Companies or both or any or either of them, of all kinds or character whatsoever; and I do hereby individually and as administratrix of the estate of Carl S. Nielsen,

deceased, release the said Albert Steinfeld and the said Silver Bell Copper Company and the said Nielsen Mining & Smelting Company from any and all claim whatsoever which I have in either of such capacities against them or either of them.

142 (Signed) MARY NIELSEN.
MARY NIELSEN.
Admx. of Carl S. Nielsen."

Witness:
T. L. CULIN,
JOSEPH SEVERANCE.

That at the time said Steinfeld so paid said sum of money to the said Mary Nielsen, he did not inform her of the price at which the property of the Silver Bell Copper Company had been sold to the Imperial Copper Company, nor any of the terms of payment, or of any details thereof; that he did not inform her and she did not know that the said Silver Bell Copper Company had declared a dividend of $LLL.00 per share on its capital stock, and did not inform her that he, the said Steinfeld had received and then had in his possession the sum of Thirty-three Thousand Three Hundred Dollars as dividends on the 300 shares of stock which he had obtained from the said Carl S. Nielsen, as aforesaid.

That the contract for the payment of the sum of Ten Thousand Dollars at the times and under the conditions provided in said contract was not an adequate consideration for the three hundred shares of stock, and that the said Steinfeld knew at the time he obtained the execution of said contract and the transfer of said stock that the said contract was not a fair consideration of said stock; and at the time the said Steinfeld paid the said sum of Ten Thousand Dollars to the said Mary Nielsen the said sum was not a fair value

143 of said stock, but that the same was a grossly inadequate price for the said stock, all of which the said Steinfeld knew.

XII.

That said Carl S. Nielsen died on the 6th day of March, 1901, and without having learned of the facts hereinbefore found as to the reasons or any of them for said Steinfeld's causing the said smelter and mine to be shut down, which impelled the said Steinfeld to cause said smelter and mines to be shut down, and without knowledge of the reasons which influenced the said Steinfeld in acquiring the said three hundred shares of stock.

XIII.

That at the time the said Mary Nielsen received the said sum of Ten thousand dollars and executed and delivered said receipt and release, she did not know that the representations in said letter of Steinfeld of January 3, 1900, were false, and did not know that at the time said Steinfeld wrote said letter he had resolved to shut down said mine and smelter for the purpose of acquiring the English Claims, and for the purpose of getting rid of the Nielsens and

acquiring the stock of the said Nielsen, and did not know that the said Nielsen had not been discharged by the Board of Directors on or about February 1st, 1900, and did not know that a false statement had been caused to be entered in the minute book showing a meeting of the Board of Directors and the passage of a resolu-
144 tion discharging the said Nielsen as Superintendent, and did not know the amount of the proceeds of the sale of the property which had been received by the Silver Bell Copper Company, and did not know that any dividend had been declared on said stock, and did not know that the said Steinfeld at the time he paid her said sum had received the sum of Thirty-three Thousand Three Hundred Dollars as dividends on said stock, and the said Steinfeld knew all of these things and did not disclose them to the said Mary Nielsen; and that the said Mary Nielsen was ignorant of the facts above set out, and received the said sum of money and executed and delivered the said receipt and release believing that the agreement of June 29, 1900, was a valid and binding contract, and that she and the estate of said Carl S. Nielsen were bound thereby, and the said plaintiff did not discover what the truth in relation to said matters set out in this finding was until within less than one year before the bringing of this action.

Done in open court this 30th day of July, A. D., 1908.

JOHN H. CAMPBELL, *Judge.*

Mr. Eugene S. Ives for Appellant; Mr. S. L. Pattee of Counsel.

Messrs. George W. Lewis, William H. Sawtelle, Francis M. Hartman and Edwin F. Jones for Appellee.

145 DOAN, *J.* (after stating the facts): It is contended by the appellants that the facts found do not constitute legal fraud, and that therefore the court erred in so finding and in rendering judgment for the plaintiff and against the defendants, based thereon. Summarizing the facts upon which the court predicated fraud in the purchase of the shares of stock of Nielsen, these are:

(1) That Steinfeld dominated and controlled the affairs of the Nielsen Mining & Smelting Company, or, as it was later called, the Silver Bell Copper Company, through its board of directors.

(2) That the corporation being in debt to the firm of L. Zeckendorf & Co., which company was under Steinfeld's immediate control, and Steinfeld's controlling a majority of the stock of the corporation, and two of the directors of the corporation being employés of the firm of L. Zeckendorf & Co., Steinfeld having the power to determine whether credits should at any time be extended to the corporation, and the legal right to enforce payment of the debt due from the corporation to L. Zeckendorf & Co., and using the power and authority he had, by reason of the foregoing facts, over the corporation, caused the closing down of the mine and smelter of the corporation in January, 1900, when the plant was producing at a substantial profit and the corporation was thereby materially reducing its indebtedness.

146 (3) That Steinfeld's purpose in causing the closing down of the mine and smleter at the time was (*a*) to enable him to

purchase the property known as the English group of mines; (*b*) to get rid of Nielsen as manager and superintendent of the company, and (*c*) to enable him to purchase the stock held by Nielsen in the Silver Bell Copper Company.

(4) That to effectuate these purposes, Steinfeld, in his letter to Nielsen, falsely represented to Nielsen that the indebtedness was not at the time being materially reduced by the profits derived from the operation of the mine and smelter, when as a matter of fact the indebtedness was being materially reduced at the time, and failed to disclose his true purpose and to state in said letter, or otherwise to inform him, that he had determined to shut down the mine and smelter for the purpose of acquiring the English group of claims and Nielsen's stock.

(5) That in furtherance of his said purposes to obtain the English group of claims and Nielsen's stock, he pretended to have Nielsen discharged as manager and superintendent of the company, causing the minute books of the company to be falsified in that it was made to show that Nielsen's discharge was on the first of February, 1900, and not later when the discharge was actually made.

(6) That the circumstances did not justify the closing down of the mine at the time this was done in that a sufficient supply
147 of ore might have been developed if development work had not been stopped by the order of Steinfeld in January, 1900.

(7) That Steinfeld knew of Nielsen's financial condition and that all his means were invested in the corporation, and taking advantage of Nielsen's financial distress, known to Steinfeld at the time, Steinfeld, to induce the sale, said to Nielsen that if he did not take the offer of Steinfeld, he (Nielsen) would get nothing for his said stock.

Unless these facts constituted legal fraud, the judgment of the trial court cannot be sustained. To determine this question, we must first establish the legal status of Steinfeld at the time of the purchase of the stock in question, to the Silver Bell Copper Company, and what fiduciary relation, if any, he sustained by reason of such status, to Nielsen, as a stockholder of the company. Steinfeld was neither an officer nor director of the corporation, yet, as found by the court, he dominated and controlled its affairs through the board of directors. Although we are not cited to any authority in point, we have no hesitation in holding that Steinfeld, because of his power over the board of directors and the affairs of the company and the domination which the findings show he actually exerted over the corporation, sustained such a relation to the company and to
148 the stockholders of the company as does an officer or director having such management and control, and that therefore he occupied such a fiduciary relation to the company and to the stockholders of the company as he would have sustained had he been such officer or director. Growing out of such relation, the question arises, what duty did Steinfeld owe to Nielsen to disclose his plans and purposes in causing the mine and smelter to be closed down, and in the second place, his purpose to obtain the English group of mines. This is the essential inquiry, inasmuch as the findings

do not show that there was any actual misrepresentation by Steinfeld to Nielsen as to any fact or facts which were not within the knowledge of Nielsen or which might not have been readily ascertained by Nielsen by virtue of his position as manager and superintendent of the company. Undoubtedly the law makes it the duty of an officer or director of a company who is seeking to purchase from a stockholder the latter's holdings of stock, to disclose to the latter facts which have come to him by virtue of his relations to the company, and not known to the stockholder or which may not be readily ascertained by the stockholder, and to disclose such plans and purposes as the corporation may have for the future which have a bearing upon the value of the stock of the company; but the underlying principle upon which this duty rests is that the officer or director, being the agent of a corporation and so in a sense
149 the agent of a stockholder, may not take advantage of the knowledge which he thus acquires, and which every member of the corporation is entitled to know, in dealing with such stockholder.

Stewart v. Harris, 69 Kan. 498.
Oliver v. Oliver, 45 S. E. 232.

The difficulty in applying that rule in this case is that Nielsen was himself an officer and director of the company, and, as such, presumptively informed of the condition of the mine, of its value and future prospects, and of the condition of its affairs. It is certainly a fair presumption of fact that the manager and director of a mining corporation would be as familiar with the affairs of the company and with its property as any other member of the corporation. It may be true that Nielsen was misled by the statement of Steinfeld that the mine at the time of its closing down was not being operated at a material profit, but if he relied upon the statement, it does not appear that his means of ascertaining the true condition of the affairs of the company were not at hand and the truth readily ascertainable. Further, as director and manager of the company, it must be presumed that he was familiar with the plans of the corporation for the future working and development of the company's properties, and that if the acquisition of other properties were essential to those plans, have known of it. The court does
150 not find as a fact that Nielsen did not in fact know that Steinfeld intended and expected that the Silver Bell Copper Company would acquire the English group of mines, but the finding is that Steinfeld did not disclose said fact to Nielsen. If Nielsen did know of such plan and intent on the part of Steinfeld, or on the part — the corporation, certainly there was no duty—conceding that Steinfeld owed such a duty in the absence of such information on the part of Nielsen—to disclose such plan and intent to Nielsen. It is true that Steinfeld withheld from Nielsen any plan or intent on his part to get rid of Nielsen, either as manager and superintendent of the company or to purchase his stock at the time he closed or caused the closing down of the mine and smelter; but this plan or purpose in itself would not constitute fraud unless it was accompa-

ied by some actual representation or withholding of some fact not
ithin the knowledge of Nielsen or readily ascertainable by him,
hich he was entitled to know.

Considering the facts in the light of the situation and the relation
f the parties, we are unable to find wherein Steinfeld violated any
uty which he owed to Nielsen, either in the way of misrepresenting
ny fact not within the knowledge of Nielsen or presumptively read-
ly ascertainable by him which would reasonably have had an effect
in bringing about the sale of the stock, or in failing to dis-
51 close any fact not known to Nielsen or presumptively readily
ascertainable by him which he was entitled to know, which
ay have put him at a disadvantage in his dealings with Steinfeld.
'e do not consider the mere fact of Nielsen's financial stress at the
ime of the purchase as in itself constituting legal fraud, for in the
bsence of any misrepresentation or concealment of fact Steinfeld
as in the position of any other purchaser in dealing with Nielsen,
nd violated no legal duty in purchasing the stock no matter how
reat Nielsen's necessities may have been.

It is true that the court found that at the time Steinfeld paid the
10,000.00 for the stock, this was a grossly inadequate price there-
or; this, however, was more than three years after the contract of
urchase had been entered into. The court does not find that at the
ime the contract was executed the price was grossly inadequate, but
nerely finds that the price agreed upon was not then an adequate
onsideration for the stock, and that Steinfeld knew that fact at the
ime. To determine whether the price agreed upon was so grossly
nadequate, using the language of the Supreme Court of the United
tates in Graffin v. Burgess, 117 U. S., 180, "as to shock the con-
cience * * *" and to "so gross a nature as to amount in
self to conclusive and decisive evidence of fraud," we must look
to the facts as they existed at the time of the contract, and
52 not at the time when the money was actually paid under the
contract. It is not mere inadequacy of price that will void
uch a contract, but the inadequacy must be so great as in itself to
urnish a strong, if not a conclusive, presumption that an undue
dvantage has been taken of the ignorance, weakness, distress, or
ecessity, of the vendor.

Kerr on Fraud and Mistake, 186.
Butler v. Haskell, 4 Des., 651.

The court does not so find; indeed, considering the indebtedness
f the Silver Bell Copper Company at the time, and the situation of
he property as disclosed by the findings, no basis for such a finding
s apparent. In our judgment the findings do not support the legal
onclusion made by the trial court that such fraud was perpetrated
y Steinfeld in the purchase of the stock, as to warrant the rescission
f the contract and the recovery of the stock and of the dividends
hich have been received by Steinfeld thereon.

For this reason the judgment of the trial court must be reversed

and the case remanded with directions to the trial court to enter judgment for the defendants.

FLETCHER M. DOAN, *A. J.*

We concur:

RICHARD E. SLOAN, *A. J.*
FREDERICK S. NAVE, *A. J.*

153 KENT, *C. J.*: I dissent from the conclusion and the result reached by my associates in the foregoing opinion. I think the judgment of the trial court was correct.

EDWARD KENT, *C. J.*

And on the same day, to-wit: the twentieth day of March, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order and judgment, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

No. 1088.

ALBERT STEINFELD and THE SILVER BELL COPPER COMPANY, a Corporation, Appellants,

vs.

MARY NIELSEN, Administratrix of the Estate of Carl S. Nielsen, Deceased, and MARY NIELSEN in Her Own Personal Right, Appellee.

This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the trial court be, and the same is hereby, reversed and the cause remanded with directions to the trial court to enter judgment for the defendants.

It is further ordered, adjudged and decreed that the Appel-
154 lants herein do have and recover of and from the Appellee herein their costs in this court, taxed at four hundred seven and 70/100 ($407.70) dollars, together with their costs in the court below in this cause incurred.

And on to-wit: the third day of April, 1909, comes the Appellee by her attorneys and files in the clerk's office of said court in said entitled cause her certain Motion for Rehearing in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona, January Term, 1909.

No. 1088.

ALBERT STEINFELD and THE NIELSEN MINING & SMELTING COMPANY, a Corporation Now Known as and Called The Silver Bell Copper Company, a Corporation, Appellants,

vs.

MARY NIELSEN, Administratrix of the Estate of Carl S. Nielsen, Deceased, and the said Mary Nielsen in Her Own Personal Right, Appellee.

Motion for Rehearing.

The Appellees come now and respectfully petition this Honorable Court for a rehearing of said cause for the following reasons, and upon the following grounds, to-wit:

155 First. Because the Court erred in rendering a judgment reversing the judgment of the Trial Court, and remanding said cause with directions to the Trial Court to enter *for judgment* Defendants.

Second. Because the Court erred in not affirming the judgment of the trial court.

Third. Because the Court erred in holding that "the findings do not show that there was any actual misrepresentation by Steinfeld to Nielsen as to any fact or facts which were not within the knowledge of Nielsen, or which might not have been readily ascertained by Nielsen by virtue of his position of Manager and Superintendent of the Company."

Fourth. Because the Court erred in holding that Nielsen was presumptively informed of the condition of the mine, of its value and future prospects; and of the condition of its affairs.

Fifth. Because the Court erred in holding that under the facts as set forth in the findings of the trial court, "It is certainly a fair presumption of fact that the Manager and Director of a Mining Corporation would be as familiar with the affairs of the Company, and with its property as any other member of the Corporation."

Sixth. Because the Court erred in holding that while "It may be true that Nielsen was misled by the statement of Steinfeld

156 that the mine at the time of its closing down was not being operated at a material profit, but if he relied upon the statement, it does not appear that his means of ascertaining the true condition of the affairs of the Company were not at hand and the truth readily ascertainable."

Seventh. Because the Court erred in holding that as Director and Manager of the Company, it must be presumed that he (Nielsen) was familiar with the plans of the Corporation for the future working and development of the Company's property, and that if the acquisition of properties was essential to those plans, have known of it."

Eighth. Because the Court erred in holding that "The (Trial) Court does not find as a fact that Nielsen did not in fact know that Steinfeld intended and expected that the Silver Bell Copper Company would acquire the English group of mines, but the finding is that Steinfeld did not disclose said fact to Nielsen."

Ninth. Because the Court erred in holding "If Nielsen did not know of such plan and intent on the part of Steinfeld, or on the part of the Corporation, certainly there was no duty—conceding that Steinfeld owed such a duty in the absence of such information on the part of Nielsen—to disclose such plan and intent to Nielsen."

Tenth. Because the Court erred in holding that "It is true
157 that Steinfeld withheld from Nielsen any plan or intent on his part to get rid of Nielsen, either as Manager and Superintendent of the Company, or to purchase his stock at the time he closed or caused the closing down of the mine and smelter, but this plan or purpose in itself would not constitute fraud unless it was accompanied by some actual representation or withholding of some fact not within the knowledge of Nielsen or readily ascertainable by him, which he was entitled to know."

Eleventh. Because the Court erred in holding "Considering the facts in the light of the situation and the relation of the parties, we are unable to find wherein Steinfeld violated any duty which he owed to Nielsen, either in the way of misrepresenting any fact not within the knowledge of Nielsen or presumptively readily ascertainable by him which would reasonably have had an effect in bringing about the sale of the stock, or in failing to disclose any fact not known to Nielsen or presumptively readily ascertainable by him which he was entitled to know, which may have put him at a disadvantage in his dealings with Steinfeld."

Twelfth. Because the Court erred in holding "We do not consider the mere fact of Nielsen's financial stress at the time of the purchase as in itself constituting legal fraud, for in the absence of any misrepresentation or concealment of fact, Steinfeld was in the position of any other purchaser in dealing with Nielsen, and
158 violated no legal duty in purchasing the stock no matter how great Nielsen's necessities may have been."

Thirteenth. Because the Court erred in holding that "The Court does not find that at the time the contract was executed the price was grossly inadequate, but merely finds that the price agreed upon was not then an adequate consideration for the stock, and that Steinfeld knew that fact at the time."

Fourteenth. Because the Court erred in holding that the Trial Court did not find that the inadequacy of price was so great as in itself to furnish a strong, if not conclusive presumption that an undue advantage had been taken of the ignorance, weakness, distress, or necessity of vendor.

Fifteenth. Because the Court erred in holding that "In our judgment the findings do not support the legal conclusion made by the Trial Court that such fraud was perpetrated by Steinfeld in the purchase of the stock, as to warrant the rescission of the contract and the

recovery of the stock and of the dividends which have been received by Steinfeld thereon."

Wherefore, petitioners pray that an order be made for a rehearing in this cause, on a day to be appointed by the Court at the present term, upon the above points and assignments, and upon such
159 other points and assignments as the Court may direct; and petitioners pray that such other and further orders be made as to the Court may seem right and proper.

Dated this 2nd day of April A. D., 1909.

GEORGE W. LEWIS,
FRANCIS M. HARTMAN,
W. H. SAWTELLE,
EDWIN F. JONES,
Attorneys for Appellees.

And on to-wit: the thirtieth day of April, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:—

Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellees, be submitted.

And on to-wit: the first day of May, 1909, being one of the regular juridical days of the January term of said court, 1909, the
160 following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:—

Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellees, and heretofore submitted, be, and the same is hereby, denied.

And on the same day to-wit: the first day of May, 1909, being one of the regular juridical days of the January term of said court, 1909, the following other order was had and entered of record in said cause in words and figures following, to-wit:—

Title of Cause.

At this day comes Mr. Francis M. Hartman for appellees herein, in open court, and gives notice of appeal to the Supreme Court of the United States from the judgment of this court, and

Upon motion of Mr. Francis M. Hartman, it is ordered that the notice of appeal be entered, the appeal be and the same is hereby allowed, the amount of the cost bond fixed in the sum of One Thousand ($1,000.) Dollars, and the Mandate stayed for sixty days.

161 And on the same day to-wit: the first day of May, 1909, come the appellees herein by their attorneys and file in the clerk's office of said court in said entitled cause their certain Petition for and Allowance of, Appeal, in words and figures following, to-wit:—

In the Supreme Court of the Territory of Arizona, January Term, 1909.

ALBERT STEINFELD and THE NIELSEN MINING AND SMELTING COMPANY, a Corporation Now Known as and Called The Silver Bell Copper Company, a Corporation, Appellants,

vs.

MARY NIELSEN, Administratrix of the Estate of Carl S. Nielsen, Deceased, and the said Mary Nielsen in Her Own Personal Right, Appellee.

Petition for Appeal and Order.

The above named appellees conceiving themselves aggrieved by the judgment and decree of this Court, made and entered on the 20th day of March, 1909, and denial of rehearing entered April 30th, 1909, in the above entitled cause, do hereby from said judgment and decree to the Supreme Court of the United States for the reasons specified in this Assignment of Errors which is filed herewith, and pray that this appeal may be allowed, that citation may
162 issue, and that the transcript of the record, proceedings and papers upon which the judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 30th day of April, 1909.

MARY NIELSEN,
As Adm'x of the Estate of Carl S. Nielsen, and
MARY NIELSEN,
In Her Own Right,
By GEO. W. LEWIS,
F. M. HARTMAN,
W. H. SAWTELLE,
EDWIN F. JONES,
Attorneys for Appellees.

ALBERT STEINFELD and THE NIELSEN MINING AND SMELTING COMPANY, a Corporation Now Known as and Called The Silver Bell Copper Company, a Corporation, Appellants,

vs.

MARY NIELSEN, Administratrix of the Estate of Carl S. Nielsen, Deceased, and the said Mary Nielsen in Her Own Personal Right, Appellee.

The appellees having this day filed in this Court petition for appeal to the Supreme Court of the United States in the above entitled

cause, it is ordered that the said appeal be and is allowed, and bond fixed at the sum of One Thousand ($1000) Dollars.

163 Dated the 1st day of May, 1909.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

And on the same day to-wit: the first day of May, 1909, come the appellees by their attorneys and file in the clerk's office of said court in said entitled cause their certain Assignment of Errors in words and figures following, to-wit:—

ALBERT STEINFELD and THE NIELSEN MINING AND SMELTING COMPANY, a Corporation Now Known as and Called The Silver Bell Copper Company, a Corporation, Appellants,

vs.

MARY NIELSEN, Administratrix of the Estate of Carl S. Nielsen, Deceased, and the said Mary Nielsen in Her Own Personal Right, Appellees.

Assignment of Errors.

The plaintiffs and appellees pray an appeal from the final decree and judgment of this Court to the Supreme Court of the United States and assign for error:

First. Because the Court erred in rendering a judgment reversing the judgment of the Trial Court, and remainding said cause with directions to the Trial Court to enter judgment for Defendants.

164 Second. Because the Court erred in not affirming the judgment of the Trial Court.

Third. Because the Court erred in holding that, "The findings do not show that there was any actual misrepresentation by Steinfeld to Nielsen as to any fact or facts which were not within the knowledge of Nielsen, or which might not have been readily ascertained by Nielsen by virtue of his position of Manager and Superintendent of the Company."

Fourth. Because the Court erred in holding that Nielsen was presumptively informed of the condition of the mine, of its value and future prospects; and of the condition of its affairs.

Fifth. Because the Court erred in holding that under the facts as set forth in the findings of the Trial Court, "It is certainly a fair presumption of fact that the Manager and Director of a Mining Corporation would be as familiar with the affairs of the Company, and with its property as any other member of the Corporation."

Sixth. Because the Court erred in holding that while "It may be true that Nielsen was misled by the the statement of Steinfeld, that the mine at the time of its closing down was not being operated at a material profit, but if he relied upon the statement, it does not appear that his means of ascertaining the true condition of the

165 affairs of the Company were not at hand and the truth readily ascertainable."

Seventh. Because the Court erred in holding that as Director and Manager of the Company, it must be presumed that he (Nielsen) was familiar with the plans of the Corporation for the future working and development of the Company's property, and that if the acquisition of property was essential to those plans, have known of it."

Eighth. Because the Court erred in holding that "The (Trial) Court does not find as a fact that Nielsen did not in fact know that Steinfeld intended and expected that the Silver Bell Copper Company would acquire the English group of mines, but the finding is that Steinfeld did not disclose said fact to Nielsen."

Ninth. Because the Court erred in holding, "If Nielsen did not know of such plan and intent on the part of Steinfeld, or on the part of the Corporation, certainly there was no duty—conceding that Steinfeld owed such a duty in the absence of such information on the part of Nielsen—to disclose such plan and intent to Nielsen."

Tenth. Because the Court erred in holding that, "It is true that Steinfeld withheld from Nielsen any plan or intent on his part to get rid of Nielsen, either as Manager and Superintendent of the Company, or to purchase his stock at the time he closed or caused the closing down of the mine and smelter, but this plan or purpose in itself would not constitute fraud unless it was accompanied
166 by some actual representation or withholding of some fact not within the knowledge of Nielsen or readily ascertainable by him, which he was entitled to know.

Eleventh. Because the Court erred in holding, "Considering the facts in the light of the situation and the relation of the parties, we are unable to find wherein Steinfeld violated any duty which he owed to Nielsen, either in the way of misrepresenting any fact not within the knowledge of Nielsen or presumptively readily ascertainable by him which would reasonably have had an effect in bringing about the sale of the stock, or in failing to disclose any fact not known to Nielsen or presumptively readily ascertainable by him which he was entitled to know, which may have put him at a disadvantage in his dealings with Steinfeld."

Twelfth. Because the Court erred in holding, "We do not consider the mere fact of Nielsen's financial stress at the time of the purchase as in itself constituting legal fraud, for in the absence of any misrepresentation or concealment of fact, Steinfeld was in the position of any other purchaser in dealing with Nielsen, and violated no legal duty in purchasing the stock no matter how great Nielsen's necessities may have been."

Thirteenth. Because the Court erred in holding that, "The Court does not find that at the time the contract was executed the price was grossly inadequate, but merely finds that the price agreed
167 upon was not then an adequate consideration for the stock, and that Steinfeld knew that fact at the time."

Fourteenth. Because the Court erred in holding that the Trial Court did not find that the inadequacy of price was so great as in itself to furnish a strong, if not conclusive presumption that an undue advantage had been taken of the ignorance, weakness, distress, or necessity of vendor.

Fifteenth. Because the Court erred in holding that, "In our judgment the findings do not support the legal conclusion made by the Trial Court that such fraud was perpetrated by Steinfeld in the purchase of the stock, as to warrant the rescission of the contract and the recovery of the stock and of the dividends which have been received by Steinfeld thereon."

Sixteenth. Because the Court erred in holding that the findings made by the Trial Court did not support the judgment and decree entered in said cause by said Trial Court.

Seventeenth. Because the Court erred in not holding that Steinfeld by and in his purchase of said stock was a trustee thereof for the benefit of appellants and plaintiffs, and liable to account therefor as such trustee.

And plaintiffs and appellees pray for an order that the decree and judgment of this Honorable Court in this case may be sus-
168 pended pending the appeal, and for a reversal of said judgment and decree of this Court.

GEO. W. LEWIS,
FRANCIS M. HARTMAN,
W. H. SAWTELLE,
EDWIN F. JONES,
Attorneys for Plaintiffs and Appellees.

And on the same day to-wit: the first day of May, 1909, there was filed in the clerk's office of said court in said entitled cause a certain Affidavit of Amount in Controversy in words and figures following, to-wit.

ALBERT STEINFELD and THE NIELSEN MINING AND SMELTING COMPANY, a Corporation, Now Known as and Called The Silver Bell Copper Company, a Corporation, Appellants,

vs.

MARY NIELSEN, Administratrix of the Estate of Carl S. Nielsen, Deceased, and the said Mary Nielsen in Her Own Personal Right, Appellee.

Affidavit of Amount of Controversy.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

Francis M. Hartman, being first duly sworn, on his oath, says: That he is one of the Attorneys of Record for the appellees in
169 the above entitled cause; and as such Attorney he is familiar with the matters and things in issue in said cause, and that the amount in controversy in said above named cause exceeds the sum of Five Thousand ($5000) Dollars, exclusive of interest and costs.

FRANCIS M. HARTMAN.

Subscribed and sworn to before me this 1 day of May, 1909.

[SEAL.] F. A. TRITLE, JR.,
Clerk Supreme Court of Arizona.

And on to-wit: the tenth day of June, 1909, there was filed nunc pro tunc as of May 1, 1909, in the clerk's office of said court in said entitled cause a certain Statement of Facts in words and figures following, to-wit:

170 In the Supreme Court of the Territory of Arizona.

No. 1088.

ALBERT STEINFELD and THE NIELSEN MINING AND SMELTING COMPANY, a Corporation, Now Known as and Called The Silver Bell Copper Company, a Corporation, Appellants,

vs.

MARY NIELSEN, Administratrix of the Estate of Carl S. Nielsen, Deceased, and the said Mary Nielsen, in Her Own Personal Rights, Appellees.

I, Edward Kent, Chief Justice of the Supreme Court of the Territory of Arizona, do hereby certify that the Supreme Court of the Territory of Arizona, having adjudged that the facts as found by the District Court in this cause did not sustain the conclusions of law or the judgment of the District Court, did, without passing in this Court upon the corrections of the facts as found by the District Court, remand this cause to the District Court with directions to that Court to enter judgment absolute for the defendants.

And on behalf of the said Supreme Court of the Territory of Arizona, I do hereby certify to the Supreme Court of the United States upon the appeal herein, that the following were the facts as found by the District Court upon which the said judgment of the Supreme Court of the Territory of Arizona was based:—

171 "I.

That the plaintiff, Mary Nielsen, is the widow of the late Carl S. Nielsen, who died intestate on or about the 5th day of March, 1901, in Pima County, Arizona Territory, leaving as his sole heir at law, his said widow, Mary Nielsen, and their four children, Hilda S., Guynne E., Ian W. and Richard H. Nielsen, then aged thirteen, eleven, nine and seven years respectively; That on the 5th day of June, 1903, the Probate Court of said Pima county, granted letters of administration on the estate of the said Carl S. Nielsen, and said Mary Nielsen was by the said court duly and Legally appointed administratrix of his estate, and duly qualified as such, and since said 5th day of June, 1903, the said Mary Nielsen has been and now is the duly qualified and acting administratrix of the estate of the said Carl S. Nielsen; and that the said Carl S. Nielsen, in his life time was a citizen and resident of the county of Pima, territory of Arizona.

II.

That the defendant, Albert Steinfeld is a citizen and resident of the county of Pima, territory of Arizona, and resides in the City of

Tucson. That the defendant, the Silver Bell Copper Company, is a corporation duly organized and existing under the laws of the territory of Arizona; that said corporation was organized on the 14th day of January, 1899, under the name of the Nielsen Mining
172 & Smelting Company; and that, by resolution of the board of directors, made on or about the 14th day of January, 1901, its name was changed to the Silver Bell Copper Company, and since that date and up to the present time the said corporation has conducted its business under and by the name of the Silver Bell Copper Company.

III.

That about the end of the year 1897, said Carl S. Nielsen leased from Albert Steinfeld, as trustee for Julia Seckendorf, the then unpatended mining claim, situate in the Silver Bell Mining district of Pima County, Arizona, known and called the Old Boot mine. That said lease was oral and terminable at will.

That under said lease the said Nielsen was to have the privilege of working said mine, and extracting and shipping and selling ores therefrom on the payment to said Steinfeld as such trustee of a royalty of $1.25 per ton on all ore extracted and shipped or smelted by him, and the said Nielsen was to do the annual assessment work on said claims.

That soon thereafter said Nielsen took charge of said mine and proceeded to work the same under said lease and extracted therefrom and smelted at the smelter erected thereat and shipped large quantities of ores; and during the time the said Nielsen was so operating he obtained his supplies from Wheeler & Perry, who were en-
173 gaged in the mercantile business in the city of Tucson, Arizona, and shipped the product of such mine through the bank.

While Nielsen was so engaged in conducting his said business, one Hugo J. Donau who was in the employ of L. Zeckendorf & Co., a firm composed of L. Zeckendorf & Albert Steinfeld, on behalf of said firm, proposed to said Nielsen that then and thereafter the products of said mine be shipped through the firm of L. Zeckendorf & Co., who would make advances and furnish supplies to be used in the working of said mines, the same to be paid for out of the product of said mine. Said proposition was agreed to and accepted by said Nielsen, and then and thereafter all the product of said mines was so shipped and certain supplies were furnished him by said Zeckendorf & Co., and the proceeds of said product were collected by said firm and applied thereon. This agreement was not by its terms to exist for any specific time.

That at the time the said Donau made said proposition he was in the employ of and acting on behalf of said firm, and at such time said Albert Steinfeld was the managing partner of said firm and in charge of its affairs.

That the prospect of said mine grew better as said Nielsen continued to work the same under said lease.

That during the time said Nielsen operated said mine under said

lease and prior to the organization of the Nielsen Mining and
174 Smelting Company he developed large quantities of ore in said Old Boot mine, and erected and used a smelter for the treatment of ores therefrom, and expended large sums of money in developing said mine and in the erection of said smelter.

That on the 14th day of January, 1899, the said Nielsen was indebted to the following persons in the following sums, to-wit:—

L. Zeckendorf & Co.	$16,608.27
L. Zeckendorf & Co.	826.25
Wheeler & Perry	2,027.27
C. T. Etchels	110.00
C. F. Schumacher	160.00
W. J. Corbett	75.00
Gardner, Worthen & Goss	438.85
J. Dobson	20.00
Employees	1,221.12
Total	$22,886.86

and the said Nielsen had on hand at the time, property, and had in transit to market, products of said mine and smelter, which were valued, by the said Nielsen and the said Curtis representing the firm of L. Zeckendorf & Co., and the said Steinfeld, at a sum slightly in excess of the debts owing by the said Nielsen, including all debts due by him to the said firm of L. Zeckendorf & Co.

IV.

That while the said Nielsen was operating said mine under
175 said lease, the said Albert Steinfeld procured J. N. Curtis to go out and examine the said mine, and after such examination the said Curtis proposed to the said Nielsen to organize a corporation to take charge of and operate said mine and smelter belonging to said Nielsen. That as a result of said proposal and the negotiations which followed it, the Nielsen Mining & Smelting Company was, on the 14th day of January, 1899, duly organized under the laws of the Territory of Arizona. That the capital stock of said company was $25,000.00, divided into one thousand shares of the par value of $25.00 each, which said stock was fully paid up, and non-assessable. That the incorporators of said corporation were J. N. Curtis, R. K. Shelton and C. S. Nielsen, and that upon the organization of said company, the said J. N. Curtis, R. K. Shelton and C. S. Nielsen became directors thereof, and the said J. N. Curtis was elected president, and treasurer of said company, and said R. K. Shelton was elected secretary of said company, and the said Nielsen was elected vice president of the said company.

That at the first meeting of the board of directors of said Nielsen Mining & Smelting Company, held January 14, 1899, the said Nielsen made a proposition to the company to sell to it his smelting plant on or near the Mammoth Mill Site, or Old Boot mine, all the ma-

chinery, tools and appliances and personal property owned
176 and used by him in connection with said smelting plant, and also all leases and licenses to work said mines and mining claims in the Silver Bell Mining District which he then had, in consideration of the corporation issuing to him nine hundred and ninety-seven shares of its capital stock, full paid and non-assessable, and also upon the company assuming and paying an indebtedenss to various persons, a list of which he presented and which is the list set out in finding III, which said indebtedness was secured by copper bullion in transit to market through the firm of L. Seckendorf & Co., and in which he agreed to assign to the company his equity.

That the said proposition was duly accepted by the corporation, and the said Nielsen duly transferred to the corporation the property mentioned in his offer, and received a certificate to the effect that he was entitled to receive therefrom nine hundred and ninety-seven shares of the capital stock of said corporation.

That the president reported a list of debts assumed by the said corporation, which said list is set out in finding III amounting to $22,886.86, and reported that the said sum of the indebtedness was secured by large shipments of copper bullion in transit.

That by motion duly made, the board of directors of said corporation agreed to accept the report of the president concerning
177 said proposal by the said Nielsen, and its acceptance by the president, and his actions in the premises were ratified and confirmed.

It was also resolved by the board of directors that the corporation take immediate charge and control of the smelting plant and property purchased, and that it continue the mining operations thereat.

On motion, it was unanimously agreed that Carl S. Nielsen be elected superintendent, and act as such for a period of one year, and Mr. Nielsen accepted the position.

V.

That after the organization of said company, it was agreed that the stock of said corporation should be issued as follows:—

500 shares to L. Zeckendorf & Co., a partnership composed of Albert Steinfeld and Louis Zeckendorf, and a certificate of 499 shares was issued to said L. Zeckendorf & Co., and 1 share was issued to said Shelton.

170 shares to J. N. Curtis,

30 shares to Albert Steinfeld as trustee for Julia Zeckendorf,

300 shares to Carl S. Nielsen,

and certificates of stock were duly issued to the parties named above for the amounts above stated.

That immediately after the said Nielsen was elected super-
178 intendent, he took charge of the property of the corporation, and, subject to the control of the said Curtis, who as president of said corporation had a general control thereof, conducted the mining and smelting operations of the company for about one year, and during the time he so operated said mine large quantities of valuable ores were extracted therefrom, smelted and the product

thereof shipped to market through the firm of L. Zeckendorf & Co., of which the said Steinfeld was the managing partner, and other bodies of ore developed.

That after the organization of said corporation, all products of the mine and smelter were turned over to L. Zeckendorf & Co., and all moneys, goods and supplies were obtained from the said firm of L. Zeckendorf & Co.

That during this time Albert Steinfeld was the acting and managing partner of L. Zeckendorf & Co., and as such had absolute control over the credit extended by said firm to the Nielsen Mining & Smelting Company, and as a member of said firm he managed, controlled and voted the stock owned by said firm in said corporation, and by means of the stock owned by said firm, and the stock held by him as trustee for Julia Zeckendorf, he controlled a majority of the stock of said Nielsen Mining & Smelting Company, and though neither an officer or director of said company, he dominated and controlled the same.

The share of stock standing in the name of R. K. Shelton
179 belonged to and was the property of L. Zeckendorf & Co., and the said Shelton was but the representative of that firm upon the board of directors of said corporation, and was dominated and controlled by the said Albert Steinfeld.

J. N. Curtis was the employee of the said firm of L. Zeckendorf & Co., and because of the business relations existing between the said Steinfeld and the said Curtis, the said Curtis was largely influenced in his actions as a director of said corporation by the said Steinfeld.

That the power of the said Albert Steinfeld over the Nielsen Mining & Smelting Company, and over the directors and officers thereof up to the purchase of the stock of C. S. Nielsen therein on June 29th, 1900 arose out of and was because of the fact that the said company was largely in debt to L. Zeckendorf & Co., and that L. Zeckendorf & Co., and the said Steinfeld as trustee for William and Julia Zeckendorf held a majority of the said stock of said company, and said Steinfeld as the manager of said firm of L. Zeckendorf & Co., having the power to control said indebtedness, and to vote the stock of said L. Zeckendorf & Co., and as trustee for William and Julia Zeckendorf, having the power to vote their stock, and because of the fact that the said J. N. Curtis and R. K. Shelton were employees of the firm of L. Zeckendorf & Co., and under the direction and con-
180 trol of said Steinfeld, and because of the fact that the said Nielsen had all of his means tied up in the said company, and was without means to secure the necessary supplies, and advances to operate said mine and smelter, and because all of the product of said mine and smelter was turned over to the firm of L. Zeckendorf & Co., who determined the disposition thereof, and which firm collected all the proceeds thereof.

And that the said Albert Steinfeld as managing partner of L. Zeckendorf & Co., had the power to determine whether at any time further credit should be extended to said company, and had the power and legal right at any time to cease extending credit to the said company. That the said firm of L. Zeckendorf & Co., was under no

obligations at any time to extend any further credit to the said corporation, and had the legal right at any time to cease giving further credit, and to enforce the collection of the amount owing to said L. Zeckendorf & Co., by said corporation.

VI.

That during the year 1899, large amounts of money were expended in developing and working said mine, and in the purchase and erection of machinery, buildings and other improvements on said mine and smelter, and thereby substantial quantities of valuable ore were discovered and developed therein, and the value of said mine was substantially increased thereby.

181 That shortly after the organization of said corporation an option was granted by Albert Steinfeld as trustee for William and Julia Zeckendorf to the said company, giving the said company the right to purchase the Old Boot mine for the sum of twenty-five thousand dollars, payable in quarterly payments of twenty-five hundred dollars each, and providing that in the event of failure to make payment of each such installment at the time it became due, the said option and right thereunder should be forfeited. And that at the time of the shutting down of the said smelter and the discharge of said Nielsen as superintendent, as hereinafter stated, there was still unpaid on said purchase price the sum of fifteen thousand dollars. Said last mentioned sum was, after July 1, 1900, paid by said company, and said mines thereby became the property of said company, and was owned by it at the time of the sale thereof to the Imperial Copper Company.

That during the months of October, November and December, 1899, and January, 1900, the smelter of the company was in active operation, and was producing copper at a material and considerable profit, and the sale of the product of said smelter was materially reducing the debt owed by said company to the firm of L. Zeckendorf & Co., the exact amount of profit during the time is not shown by the evidence.

182 VII.

That some time in the year 1899 the said Steinfeld determined to get rid of Nielsen as a stockholder in said company, and on January 3, 1900 the said Steinfeld wrote the following letter to Nielsen:

"Mr. C. S. Nielsen, Red Rock, Ariz.

DEAR SIR: In view of the very large indebtedness existing against the company, and the fact that little headway is being made towards its liquidation, I have decided after careful consideration, to close down both mine and smelter when the present coke supply is exhausted, which will be about the 15th or 20th inst. You will please make all provisions to this end incurring no larger outlay than is absolutely necessary for such articles of wood, ore and other supplies, except what would be required for the purposes stated. The present good showing in the mine may place us in a position to sell the prop-

erty at an advantageous price, and this will be my aim to do at the very earliest possible moment. It will also be wise for you to advise George in that no credits be extended to any one beyond what can be collected during the time contemplated and that every effort be made to collect all outstandings pending to date.

Yours truly, ALBERT STEINFELD."

183 That at and prior to the time the said Steinfeld wrote the said letter the said mine and smelter of said company were running at a considerable profit, and the debt due from said company to the firm of L. Zeckendorf & Co., was being substantially reduced, and that these facts were known to the said Steinfeld at the time he wrote and sent said letter to Nielsen.

That at the time he wrote said letter the said Steinfeld had made up his mind to shut down said mine and smelter for the purpose of acquiring the interest of Nielsen in said corporation, and for the purpose of acquiring a certain adjoining group of mines known as and hereafter referred to as the English claims before proceeding with the development of the Old Boot mine, and wrote said letter in pursuance of his said purpose.

That the said English group of mines adjoined the Old Boot mine, and if acquired for the corporation would greatly add to the value of the stock held by the said Nielsen in said corporation, all of which was known to said Steinfeld; that at the time the said Steinfeld wrote the said letter dated January 3rd, 1900, and at the time of the discharge of the said Nielsen as superintendent as hereinafter found, and at the time Steinfeld acquired the stock held by the said Nielsen as hereinafter found, the said Steinfeld intended and expected that the said corporation would acquire the said English group of

184 mines, but did not disclose said fact to the said Nielsen.

That on or about the 1st day of February, 1900, the said Steinfeld, although he was neither a director or officer of said company, undertook to discharge said Nielsen from his position as superintendent of said company, and the said Nielsen refused to be discharged by the said Steinfeld. That at the time said Steinfeld undertook to discharge said Nielsen, he had not been authorized by the board of directors to do so, and had not consulted the said board, and the said board had not in any way authorized any one to discharge the said Nielsen as such superintendent.

That subsequently the directors Curtis and Shelton, for the purpose of making it appear from the records of the corporation that said Steinfeld had authority to discharge the said Nielsen, caused to be entered upon the corporate minutes of said company, as of the date of February 1st, 1900 the following resolution:

'On motion duly seconded, it was resolved that C. S. Nielsen be and he hereby is discharged as superintendent of this corporation, and his salary as such be discontinued from this date.'

Whereas, in truth and in fact, the said resolution was not put upon the minutes, and no meeting was held on February 1st, 1900, and not until some days thereafter, on or about the 10th day of March, 1900.

And that thereafter, on or about the 10th day of March, 1900 the directors of the said corporation, at a meeting at ich J. N. Curtis and R. K. Shelton only were present, but of which eting said Nielsen had notice, passed the following resolution:
On motion, duly seconded, the action of the board of directors ts meeting held February 1st, 1900, in discharging C. S. Nielsen its superintendent was ratified, approved and confirmed.
On motion it was unanimously resolved that the said C. S. Nielsen and he is hereby discharged as the superintendent of the com-y.'

That at the time above last mentioned resolution of March 10th, 0, was passed, reciting the ratification of the action of the meet- of February 1st, 1900 the said Curtis and the said Shelton well w that no such meeting of the board of directors had been held February 1st, 1900.

That on or about the 19th day of February 1900 the said Nielsen eving he had been regularly discharged as such superintendent the board of directors, and believing the statements of said Stein- in his letter of January 3, 1900, and having all his means in- ed in said company, and the existing supply of coke then at the lter being exhausted, and the said Nielsen being powerless to obtain supplies to run said mine and smelter, and all the as-sets of said corporation being under the control of the said Steinfeld, did shut down the said mine and smelter and cease e in possession and control thereof.

VIII.

That in January, 1900, said Steinfield caused the development k on said mine to be stopped, the smelter however was run until e time in February, 1900, at which time all the coke and sup- s necessary for the operation of the smelter, and substantially f the ore which had been developed prior thereto were exhausted, if the development work had not been stopped by the said nfield, but had been continued during the operations of the said lter, sufficient ore would have been developed to have kept the lter continuously supplied. That the said Nielsen at the time he closing down of the smelter knew the condition of the mine. t at the time said Steinfeld had such mine shut down he was rmed of the value of said Old Boot mine, and of the value of adjoining properties thereto, and did not shut down said mine smelter because of the very large indebtedness existing against company and the fact that little progress was being made to-ds its liquidation, or because it was running deeper and deeper debt to said L. Zeckendorf & Co., or because the ore was ex-sted, but shut down the same solely and exclusively for the purpose of getting rid of the said Nielsen as a stockholder in said corporation, and to acquire his said stock, and for the purpose of acquiring the English group of mines.

IX.

That after the mine and smelter of the said Nielsen Mining and elting Company had been closed down as aforesaid, the said

Steinfeld called upon the said Carl S. Nielsen, and proposed to buy his stock in said company and also all interest which the said Nielsen and one Lewis might have to the mines or mining claims situate in said Silver Bell Mining District.

That during the negotiations the said Steinfeld stated to the said Nielsen that if he did not take the offer of the said Steinfeld he would get nothing for his said stock.

That at the time the said Steinfeld was negotiating with the said Nielsen, the said Nielsen was in financial distress, and was without means, and this fact was known to the said Steinfeld at the time.

That such negotiations were had on or about the 29th day of June, 1900. That the said Nielsen and the said Lewis executed to the said Steinfeld a quit-claim deed to the said Clarence and Identical mining claims for a recited consideration of two thousand dollars, and on the same day and at the time of the execution of the said agreement hereinafter set forth, said Carl S. Nielsen and Mary Nielsen executed and delivered to the said Steinfeld a bill of
188 sale, by the terms of which they sold, assigned and transferred to the said Steinfeld the said three hundred shares of stock, and also signed and executed on the back of the certificate representing such stock an assignment and transfer thereof to the said Steinfeld, and delivered such certificate with such assignment and transfer endorsed thereon to the said Steinfeld, and a contract was signed by Albert Steinfeld, Nielsen Mining & Smelting Company, by J. N. Curtis, president, Mary Nielsen and Carl S. Nielsen, but was never acknowledged by said Steinfeld or by said Curtis as president on behalf of the Nielsen Mining & Smelting Company. That the said deed, transfer and contract were prepared by S. M. Franklin, the attorney of the Nielsen Mining & Smelting Company at the instance and upon the information furnished by the said Steinfeld, and was sent by Steinfeld to be signed and acknowledged before W. P. Cooper by Carl S. Nielsen and Mary Nielsen.

That upon the execution and delivery of said deed, the said Steinfeld paid to Nielsen and to said Lewis the sum of two thousand dollars in cash as a consideration for said Clarence and Identical mining claims, which was equally divided between said Carl S. Nielsen and said Lewis, as the joint owners of said Clarence mine.

That the said contract is in the words and figures as follows, to-wit:

This agreement made the 29th day of June, 1900, be-
189 tween Albert Steinfeld and the Nielsen Mining & Smelting Company, a corporation organized and existing under the laws of the territory of Arizona, parties of the first part, and Carl S. Nielsen and Mary Nielsen, his wife, parties of the second part, witnesseth:

That the parties of the first part in consideration of the transfer by said Carl S. Nielsen to Albert Steinfeld of the three hundred shares of the capital stock of the Nielsen Mining & Smelting Company, and in consideration of the parties of the second part executing their deed of quit claim and release of their interest in and to certain mining claims as fully appear from certain quit claim deed executed by the parties of the second said part and one L. B. Lewis,

to said Albert Steinfeld, and in further consideration of the sum of one dollar by the said parties of the second part in hand paid to the parties of the first part, receipt whereof is hereby acknowledged, do hereby agree that they will pay unto the parties of the second part the sum of ten thousand dollars, lawful money of the United States, as soon as the Nielsen Mining & Smelting Company will consum-ate a sale of its mining properties which are situate in the Silver Bell Mining district, Pima county, Arizona, such sum to be paid within thirty days after such sale is completed.

Said parties of the first part further agree that in the event that the Nielsen Mining & Smelting Company should commence
190 active operations that then and in that event the net profits which may arise to said company from its said working and shipping and operating shall be applied first, to the payment of the debts of said company, second after said debts are paid said net profits up to the amount of ten thousand dollars shall be paid to the party of the second part, and upon full payment of said sum of ten thousand dollars out of said profits the parties of the first part hereto shall be relieved from all obligations to pay said parties of the second part a like sum of ten thousand dollars, or any part thereof, in the event said company consum-ates or completes a sale of its property as hereinbefore agreed; that is to say, in no event shall said parties of the second part be paid more than the sum of ten thousand dollars.

In Witness Whereof the parties have hereunto placed their hands the day and year first above written. In triplicate.

ALBERT STEINFELD.
NIELSEN MINING & SMELTING CO.,
By J. N. CURTIS, *President.*
MARY NIELSEN.
CARL S. NIELSEN.

TERRITORY OF ARIZONA,
County of Pima, ss:

Before me, William F. Cooper, a notary public in and for
191 the county of Pima, territory of Arizona, on this day personally appeared Carl S. Nielsen, and Mary Nielsen, wife of said Carl S. Nielsen, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purpose and consideration therein expressed, and the said Mary Nielsen, wife of said Carl S. Nielsen, having been examined by me privately and -part from her husband, and having the same fully explained to her, she the said Mary Nielsen acknowledged said instrument to be her act and deed and declared that she had willingly signed the same for the purpose and consideration therein expressed, and that she did not wish to retract it.

Given under my hand and seal of office this 29th day of June, A. D., 1900.

WILLIAM F. COOPER,
Notary Public.

My Commission expires March 13th, 1901.

That at the time said Steinfeld entered into negotiations for the purchase of the stock of said Nielsens, and the interest of said Nielsen and said Lewis in said mining claims, and at the time he procured the said Nielsen to sign the said deed, and transfer said stock, and enter into and sign the contract above set out, he did not inform the said Nielsen that he had shut down the mine and smelter of the said Nielsen Mining & Smelting Company for
192 the purpose of getting rid of the said Nielsen, and for the purpose of acquiring the English claims, and did not inform the said Nielsen that the said Steinfeld had no authority to do so when he attempted to discharge the said Nielsen, and did not inform the said Nielsen that the entry contained in said minute book of the company was a false entry purporting to have been made therein as a record of a meeting of the directors of said company held about the 1st of February, 1900, and did not inform him that no meeting of the directors was held on that day, and that the said minute book contained a false record of such pretended meeting.

That the said Nielsen at the time he signed said deeds and executed said contract, and made the said transfer of the stock in the Nielsen Mining & Smelting Company, did not know that the said Steinfeld had shut down said mine and smelter for the purpose of getting rid of Nielsen and acquiring his stock, and did not know that the said mine and smelter had been shut down while the same was making money in order to enable said Steinfeld to acquire the title to the English group, and did not know that the said Steinfeld had no authority from the board of directors to discharge the said Nielsen, or that the records in the minute book of the company showing his discharge by said board of directors on or about the 1st day of February, 1900, was false, and that no such meeting
193 of the board of directors was ever in fact held, but the said Nielsen believed that he had been legally and duly discharged and that the said Steinfeld had shut down said mine and smelter for the reasons stated in his letter of January 3, 1900, and acted and relied on such belief.

That the said Nielsen was in financial distress, and was without means to resist the will and direction of the said Steinfeld and the said Steinfeld knew of the pecuniary condition of the said Nielsen.

That the said contract of June 29th, 1900 was not authorized by the board of directors of the Nielsen Mining & Smelting Company, and that said Curtis signed the same on the part of the company without any authority of the board of directors of said company at the instance and request of said Steinfeld.

That upon acquiring the said three hundred shares of stock as aforesaid, the said Steinfeld surrendered the certificates standing in the name of Carl S. Nielsen, and there was issued in lieu thereof a certificate for three hundred shares in the name of 'Albert Steinfeld, trustee,' and said shares have since remained and now stand on the books of said corporation in the name of 'Albert Steinfeld trustee.'

That neither the said Steinfeld nor the said Curtis made any false representations to the said Carl S. Nielsen or Mary Nielsen or either

of them with reference to the amount of the indebtedness of
194 the Nielsen Mining & Smelting Company to L. Zeckendorf & Co., but said Carl S. Nielsen and Mary Nielsen had at all times the means of ascertaining the amount of the indebtedness of said corporation to L. Zeckendorf & Co., and could with reasonable effort have ascertained the same; and in all the transactions herein set forth neither the said Carl S. Nielsen nor Mary Nielsen — relief on any such representations.

XI.

That the English group of mines were acquired by the said Steinfeld, and were, in May, 1903, together with the Old Boot mine, sold for the sum of five hundred and fifteen thousand dollars, and the entire proceeds of the sale became the property of the Silver Bell Copper Company.

That on or about the 20th day of January, 1904, the board of directors of the Silver Bell Copper Company declared a dividend of $111.00 per share on the capital stock of said company, and the said Albert Steinfeld received from the said Silver Bell Copper Company the sum of thirty-three thousand three hundred dollars as dividends on the three hundred shares of stock which he had obtained from the said Carl S. Nielsen as above set forth; that the said Steinfeld has kept and retained the said sum of thirty-three thousand three hundred dollars, and claims the same as his own.

That on the 23rd day of January, 1904, the said Steinfeld
195 paid to the said Mary Nielsen the sum of $10,000.00, and received from the said Mary Nielsen a receipt therefor, which said receipt is in the words and figures following, to-wit:

TUCSON, ARIZONA, *January* 23, 1904.

Received from Albert Steinfeld the sum of ten thousand dollars ($10,000.00) the same being in full of all claims against Albert Steinfeld and the Nielsen Mining & Smelting Company or the Silver Bell Copper Company, or any or either of them, of all claims or demands which Carl S. Nielsen or Mary Nielsen have or had against the said Steinfeld and the said companies or both or any or either of them of all kinds or character whatsoever; and I do hereby individually and as administratrix of the estate of Carl S. Nielsen, deceased, release the said Albert Steinfeld and the said Silver Bell Copper Company and the said Nielsen Mining & Smelting Company from any and all claim whatsoever which I have in either of such capacities against them or either of them.

(Signed) MARY NIELSEN.
MARY NIELSEN,
Adm'x of Carl S. Nielsen.

Witness-:
T. L. CULIN.
JOSEPH SEVERANCE.

That at the time said Steinfeld so paid said *said* sum of money to the said Mary Nielsen, he did not inform her of the price
196 at which the property of the Silver Bell Copper Company had been sold to the Imperial Copper Company, nor any of

the terms of payment, or of any details thereof; that he did not inform her and she did not know that the said Silver Bell Copper Company had declared a dividend of $111.00 per share on its capital stock, and did not inform her that he, the said Steinfeld, had received and then had in his possession the sum of thirty-three thousand three hundred dollars as dividends on the 300 shares of stock which he had obtained from the said Carl S. Nielsen, as aforesaid.

That the contract for the payment of the sum of ten thousand dollars at the times and under the conditions provided in said contract was not an adequate consideration for the three hundred shares of stock, and that the said Steinfeld knew at the time he obtained the execution of said contract and the transfer of said stock that the said contract was not a fair consideration for said stock; and at the time the said Steinfeld paid the said sum of ten thousand dollars to the said Mary Nielsen the said sum was not a fair value of said stock, but that the same was a grossly inadequate price for the said stock, all of which the said Steinfeld knew.

XII.

That the said Carl S. Nielsen died on the 6th day of March, 1901, and without having learned of the facts hereinbefore found
197 as to the reasons or any of them for said Steinfeld's causing the said smelter and mine to be shut down, which impelled the said Steinfeld to cause said smelter and mines to be shut down, and without knowledge of the reasons which influenced the said Steinfeld in acquiring the said three hundred shares of stock.

XIII.

That at the time the said Mary Nielsen received the said sum of ten thousand dollars and executed and delivered said receipt and release, she did not know that the representations in said letter of Steinfeld of January 3, 1900, were false, and did not know that at the time said Steinfeld wrote said letter he had resolved to shut down said mine and smelter for the purpose of acquiring the English claims, and for the purpose of getting rid of the Nielsens and acquiring the stock of the said Nielsen, and did not know that the said Nielsen had been discharged by the board of directors on or about February 1st, 1900, and did not know that a false statement had been caused to be entered in the minute book showing a meeting of the board of directors and the passage of a resolution discharging the said Nielsen as superintendent, and did not know the amount of the proceeds of the sale of the property which had been received by the Silver Bell Copper Company, and did not know that any dividend had been declared on said stock, and did not know that the
198 said Steinfeld at the time he paid her said sum had received the sum of thirty-three thousand three hundred dollars as dividends on said stock, and the said Steinfeld knew all of these things, and did not disclose them to the said Mary Nielsen; and that the said Mary Nielsen was ignorant of the facts above set out, and received the said sum of money, and executed and delivered the said receipt and release believing that the agreement of June 29,

1900, was a valid and binding contract, and that she and the estate of said Carl S. Nielsen were bound thereby, and the said plaintiff did not discover what the truth in relation to said matters set out in this finding was until less than one year before the bringing of this action.

Done in Open Court this 30th day of July A. D. 1908.

JOHN H. CAMPBELL, *Judge.*"

Dated this 1st day of May A. D. 1909.

EDWARD KENT,
Chief Justice

And on to-wit: the twelfth day of June, 1909, there was filed in the clerk's office of said court in said entitled cause a certain Bond in words and figures following, to-wit:

199 *Cost Bond on Appeal.*

ALBERT STEINFELD and THE NIELSEN MINING AND SMELTING COMPANY, a Corporation, Now Known as and Called The Silver Bell Copper Company, a Corporation, Appellants,

vs.

MARY NIELSEN, Administratrix of the Estate of Carl S. Nielsen, Deceased, and the said Mary Nielsen in Her Own Personal Right, Appellee.

Know all men by these presents, that we, Mary Nielsen, Administratrix of the estate of Carl S. Nielsen, deceased, and Mary Nielsen in her own personal right, as principals, and Catherine Hesse and Brown McDonald, as sureties, are held and firmly bound unto Albert Steinfeld and the Nielsen Mining and Smelting Company, a corporation, now known as and called the Silver Bell Copper Company, a corporation, in the full and just sum of One Thousand ($1000) Dollars to be paid to the said Albert Steinfeld and the Nielsen Mining and Smelting Company, a corporation, now known as and called the Silver Bell Copper Company, a corporation, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 22nd day of May, in the year of our Lord one thousand nine hundred and nine.

200 Whereas, lately at a Supreme Court for the Territory of Arizona, holden on the 20th day of March, 1909, in a suit depending in said Court between the above named Albert Steinfeld and the Nielsen Mining and Smelting Company, a corporation, now known as and called the Silver Bell Copper Company, a corporation, appellants, and Mary Nielsen, Administratrix of the estate of Carl S. Nielsen, deceased, and said Mary Nielsen in her own personal right, appellees, a judgment and decree was rendered against the said Mary Nielsen, Administratrix of the estate of Carl S. Nielsen, Deceased, and the said Mary Nielsen in her own personal right, and the said

Mary Nielsen, Administratrix of the estate of said Carl S. Nielsen, deceased, and the said Mary Nielsen in her own personal right, having obtained an appeal and filed a copy thereof in the Clerk's office of said Court, to reverse the decree and judgment in the aforesaid suit, and the citation directed to the said Albert Steinfeld and the Nielsen Mining and Smelting Company, a corporation now known as and called the Silver Bell Copper Company, a corporation, citing and admonishing them and each of them, to be and appear at a session of the Supreme Court of the United States to be held at the city of Washington on the 28th day of June next.

Now the condition of the above obligation is such that, if the said Mary Nielsen, Administratrix of the estate of Carl S. Nielsen, deceased, and the said Mary Nielsen in her own personal right,
201 shall prosecute their appeal to effect and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void; else to remain in full force and effect.

MARY NIELSEN, [SEAL.]
Administratrix of the Estate of
Carl S. Nielsen, Deceased.
MARY NIELSEN. [SEAL.]
CATHERINE HESSE. [SEAL.]
BROWN McDONALD. [SEAL.]

Sealed and delivered in presence of:
FRANCIS M. HARTMAN.
R. W. LANGWORTHY.

TERRITORY OF ARIZONA,
County of Pima, ss:

Catherine Hesse and Brown McDonald, the sureties on the above entitled bond, being first duly sworn on their oaths, each for himself and not one for the other, doth say: that he is worth the sum of One Thousand ($1,000) Dollars, being the amount for which he has become surety on the above bond, over and above his just debts and liabilities, exclusive of property exempt from execution, and that he is a householder and resident of said Territory.

CATHERINE HESSE.
BROWN McDONALD.

202 Subscribed and sworn to before me this 22nd day of May A. D., 1909.

My Commission expires Aug. 13, 1910.

[SEAL.] R. W. LANGWORTHY,
Notary Public.

Approved:
EDWARD KENT,
Chief Justice of the Supreme Court
of the Territory of Arizona.

And on to-wit: the twelfth day of November, 1909, being one of the regular juridical days of the January term of said court, 1909,

the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered by the Court that all former Statement of Facts filed in this cause in this court, be, and the same are hereby, withdrawn, and a Certificate of the Chief Justice in regard to Statement of Facts, filed.

203 And on the same day to-wit: the twelfth day of November, 1909, being one of the regular juridical days of the January Term of said court, 1909, the following other order was had and entered of record in said cause in words and figures following, to-wit:—

Title of Cause.

At this day, it is ordered by the Court that the time within which to prepare and file the Transcript of Record in this cause in the Supreme Court of the United States be, and the same is hereby, enlarged sixty days.

And on the same day to-wit: the twelfth day of November, 1909, there was filed in the clerk's office of said court in said entitled cause a certain Certificate of the Chief Justice as to Statement of Facts.

204 In the Supreme Court of the Territory of Arizona.

No. 1088.

ALBERT STEINFELD and THE NIELSEN MINING AND SMELTING COMPANY, a Corporation, Now Known as and Called The Silver Bell Copper Company, a Corporation, Appellants,

vs.

MARY NIELSEN, Administratrix of the Estate of Carl S. Nielsen, Deceased, and the said Mary Nielsen in Her Own Personal Rights, Appellees.

I, Edward Kent, Chief Justice of the Supreme Court of the Territory of Arizona, do hereby certify that the Supreme Court of the Territory of Arizona, having adjudged that the facts as found by the District Court in this cause did not sustain the conclusions of law or the judgment of the District Court, did, without passing in this Court upon the correctness of the facts as found by the District Court, remand this cause to the District Court with directions to that Court to enter judgment absolute for the defendants, and therefore do not certify to the United States Supreme Court any statement of facts in the nature of a special verdict.

Dated this 12th day of November, 1909.

EDWARD KENT,
Chief Justice.

205 UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true and complete copy and Transcript of the Record, including the Third Amended Complaint, Answer of Defendants to Second Amended Complaint, Stipulation of counsel in regard to Answer of Defendant, Demurrer and Replication, Findings of Fact, Judgment, Motion for New Trial, Minute Entries in the District Court, Appeal and Supersedeas Bonds, Opinion of the Supreme Court, Judgment, Motion for Rehearing, Petition for and Allowance of Appeal, Assignments of Error, Affidavit of Amount in Controversy, Statement of Facts, Bond on Appeal, Certificate as to Statement of Facts, and all minute entries had and entered of record in a certain cause lately pending in said Court, No. 1088, wherein Albert Steinfeld, et al., were Appellants, and Mary Nielsen, Administratrix of the Estate of Carl S. Nielsen, deceased, and Mary Nielsen in her own personal right, was Appellee, as the same remain on file and of record in my office.

And I further certify that the same constitute the record in said cause.

And I further certify that the attached Alias Citation is
206 the original Alias Citation issued by said Supreme Court.

In witness whereof, I have hereunto set my hand and the seal of said Court, this 31 day of January, A. D., 1910, at Phœnix, Arizona.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,
Clerk Supreme Court.

207 In the Supreme Court of the United States of America.

ALBERT STEINFELD and THE NIELSEN MINING AND SMELTING COMPANY, a Corporation, Now Known as and Called The Silver Bell Copper Company, a Corporation, Appellants,

vs.

MARY NIELSEN, Administratrix of the Estate of Carl S. Nielsen, Deceased, and the said Mary Nielsen in Her Own Personal Right, Appellees.

Alias Citation.

THE UNITED STATES OF AMERICA, *ss:*

To Albert Steinfeld and The Nielsen Mining and Smelting Company, a corporation, now known as and called The Silver Bell Copper Company, a corporation, Greeting:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, in the District of Columbia, within sixty days from the

date hereof pursuant to an appeal filed in the Clerk's office of the Supreme Court of Arizona, wherein said Albert Steinfeld and the Nielsen Mining and Smelting Company, a corporation, now known as, and called the Silver Bell Copper Company, a corporation, were appellants, and Mary Nielsen as Administratrix of the estate of Carl S. Nielsen, deceased, and Mary Nielsen in her own personal right, were appellees, to show cause, if any there be, why the judgment in said appeal mentioned, to-wit: the judgment of the Supreme Court of the Territory of Arizona, dated and rendered March 20, 1909, in your favor should not be set aside, reversed and corrected, and why speedy justice should not be done to the parties in whose behalf said appeal is allowed.

Witness the Honorable Edward Kent, Chief Justice of the
208 Supreme Court of the Territory of Arizona, the 7th day of December, A. D., 1909.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

209 [Endorsed:] No. 1088. In the Supreme Court of the Territory of Arizona. Albert Steinfeld and the Nielsen Mining and Smelting Company, a corporation now known as, and called, the Silver Bell Copper Company, a corporation, Appellants, vs. Mary Nielsen, Administratrix of the estate of Carl S. Nielsen, deceased, and the said Mary Nielsen in her own personal right, Appellee. Alias Citation. Service of the within citation admitted this 15th day of December 1909. Eugene S. Ives, Attorney for Appellees. Filed Dec. 17, 1909. F. A. Tritle, Jr., Clerk.

Service accepted this the 11th day of December 1909.

Endorsed on cover: File No. 22,041. Arizona Territory Supreme Court. Term No. 218. Mary Nielsen, administrator of the estate of Carl S. Nielsen, deceased, and Mary Nielsen, in her own personal right, appellants, vs. Albert Steinfeld and The Nielsen Mining & Smelting Company, now known as and called The Silver Bell Copper Company. Filed February 25th, 1910. File No. 22,041.

Office Supreme Court, U. S.
FILED.
FEB 26 1912
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1911

Mary Nielsen, Administratrix of the Estate of Carl S. Nielsen, Deceased, and Mary Nielsen in her own Personal Right,

Appellants,

vs.

Albert Steinfeld and the Nielsen Mining and Smelting Company, now known as and called the Silver Bell Copper Company,

Appellees.

No. 218.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA

Appellants' Brief

WILLIAM HERRING,
Attorney for Appellants.

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1911

Mary Nielsen, Administratrix of the Estate of Carl S. Nielsen, Deceased, and Mary Nielsen in her own Personal Right,
Appellants,

vs.

Albert Steinfeld and the Nielsen Mining and Smelting Company, now known as and called the Silver Bell Copper Company,
Appellees.

No. 218.

Appellants' Brief

STATEMENT.

The original complaint in this cause was filed in the District Court of Pima County, Arizona, by the appellant Mary Nielsen suing individually and as the administratrix of her deceased husband, Carl S. Nielsen, against the appellees Albert Steinfeld and the Nielsen Mining and Smelting Company, now known as and called the Silver Bell Copper Company. It sought to set aside a transfer of three hundred shares of stock in the Nielsen Mining and Smelting Company made by Carl S. Nielsen to

Albert Steinfeld on the ground of fraud and misrepresentation by Steinfeld in the purchase of the stock and for an accounting from Steinfeld of the moneys he had received as dividends on the stock thus transferred and to have the appellant declared the lawful owner of the stock in question and to compel a reconveyance of the stock by Steinfeld to her and an acknowledgment by the Company of her status as a stockholder.

The District Court made findings of fact and on these findings rendered a judgment setting aside the sale and transfer of the stock to Steinfeld and directing that he transfer the stock to Mrs. Nielsen as administratrix, restoring her status as a stockholder in the Company, and rendering a money judgment against Steinfeld for the amount of the dividends received by him and interest thereon to the date of the judgment less the amount paid by him on the contract in question.

There was an appeal by the appellees to the Supreme Court of Arizona and that Court, the Chief Justice dissenting, held that the findings of the District Court did not sustain the judgment and reversed the case with instructions to enter judgment final for the defendants in the District Court. From this action of the Supreme Court of Arizona this appeal is prosecuted.

The Supreme Court of the Territory made no special fiindings but certified "that the Supreme Court of the Territory of Arizona, having adjudged that the facts as found by the District Court in this cause did not sustain the conclusions of law or the judgment of the District Court, did without passing in this Court upon the correctness of the facts as found by the District Court, remand this cause to the District Court, with directions to that Court to render judgment absolute for the defendants and therefore do not certify to the United States Supreme Court any statement of facts in the nature of a special verdict".

Under the Act of Congress of April 7th, 1874, 18 Statutes at Large 27, if the findings of the District Court are sustained by the Supreme Court and a general judgment of affirmance rendered, the findings of the District Court thus approved by the Supreme Court will furnish a sufficient "statement of the facts of the case" for the purposes of an appeal to the Supreme Court of the United States. The same will be true if there is a revers-

al for the reason that the facts as found are not sufficient to support the judgment.

Stringfellow vs. Cain, 99 U. S., 610.

Bierce vs. Hutchins, 205 U. S., 340.

The facts as found by the District Court contain a succient statement of all of the facts out of which this litigation grew. They are set out on pages 26 to 39 inclusive of the transcript of record in this cause and hence it is not deemed proper or necessary to repeat them here.

ASSIGNMENT OF ERRORS.

The plaintiffs and appellants assign for error.

"First. The Court erred in rendering a judgment reversing the judgment of the Trial Court, and remanding said cause with directions to the Trial Court to enter judgment for defendants.

"Second. The Court erred in not affirming the judgment of the Trial Court.

"Third. The Court erred in holding that, "the findings do not show that there was any actual misrepresentation by Steinfeld to Nielsen as to any fact or facts which were not within the knowledge of Nielsen, or which might not have been readily ascertained by Nielsen by virtue of his position of Manager and Superintendent of the Company."

"Fourth. The Court erred in holding that Nielsen was presumptively informed of the condition of the mine, of its value and future prospects; and of the condition of its affairs.

"Fifth. The Court erred in holding that under the facts as set forth in the findings of the Trial Court, "It is certainly a fair presumption of fact that the Manager and Director of a Mining Corporation would be as familiar with the affairs of the Company, and with its property as any other member of the Corporation."

"Sixth. The Court erred in holding that while "It may be true that Nielsen was mislead by the statement of Steinfeld, that the mine at the time of its closing down was not being operated at a material profit, but if he relied upon the statement, it does not appear that his means of ascertaining the true condition of the affairs of the Company were not at hand and the truth readily ascertainable."

"Seventh. The Court erred in holding that as Director and Manager of the Company, it must be presumed that he

(Nielsen) was familiar with the plans of the Corporation for the future working and development of the Company's property, and that if the acquisition of property was essential to those plans, have known of it."

"Eighth. The Court erred in holding that "The (Trial) Court does not find as a fact that Nielsen did not in fact know that Steinfeld intended and expected that the Silver Bell Copper Company would acquire the English group of mines, but the finding is that Steinfeld did not disclose said fact to Nielsen."

"Ninth. The Court erred in holding, "If Nielsen did not know of such plan and intent on the part of Steinfeld, or on the part of the Corporation, certainly there was no duty—conceding that Steinfeld owed such a duty in the absence of such information on the part of Nielsen—to disclose such plan and intent to Nielsen."

"Tenth. The Court erred in holding that, "It is true that Steinfeld withheld from Nielsen any plan or intent on his part to get rid of Nielsen, either as Manager and Superintendent of the Company, or to purchase his stock at the time he closed or caused the closing down of the mine and smelter, but this plan or purpose in itself would not constitute fraud unless it was accompanied by some actual representation or withholding of some fact not within the knowledge of Nielsen or readily ascertainable by him, which he was entitled to know.

"Eleventh. The Court erred in holding, "Considering the facts in the light of the situation and the relation of the parties, we are unable to find wherein Steinfeld violated any duty which he owed to Nielsen, either in the way of misrepresentating any fact not within the knowledge of Nielsen or presumptively readily ascertainable by him which would reasonably have had an effect in bringing about the sale of the stock, or in failing to disclose any fact not known to Nielsen or presumptively readily ascertainable by him which he was entitled to know, which may have put him at a disadvantage in his dealings with Steinfeld."

"Twelfth. The Court erred in holding, "We do not consider the mere fact of Nielsen's financial stress at the time of the purchase as in itself constituting legal fraud, for in the absence of any misrepresentation or concealment of fact, Steinfeld was in the position of any other purchaser in dealing with Nielsen, and violated no legal duty in purchasing the stock no matter how great Nielsen's necessities may have been."

"Thirteenth. The Court erred in holding that, "The Court

does not find that at the time the contract was executed the price was grossly inadequate, but merely finds that the price agreed upon was not then an adequate consideration for the stock, and that Steinfeld knew that fact at the time."

"Fourteenth. The Court erred in holding that the Trial Court did not find that the inadequacy of price was so great as in itself to furnish a strong, if not conclusive presumption that an undue advantage had been taken of the ignorance, weakness, distress, or necessity of vendor.

"Fifteenth. The Court erred in holding that, "In our judgment the findings do not support the legal conclusion made by the Trial Court that such fraud was perpetrated by Steinfeld in the purchase of the stock, as to warrant the rescission of the contract and the recovery of the stock and of the dividends which have been received by Steinfeld thereon."

"Sixteenth. The Court erred in holding that the findings made by the Trial Court did not support the judgment and decree entered in said cause by said Trial Court.

"Seventeenth. The Court erred in not holding that Steinfield by and in his purchase of said stock was a trustee thereof for the benefit of appellants and plaintiffs, and liable to account thereunder as such trustee.

ARGUMENT.

The first, second, fifteenth, sixteenth and seventeenth assignments of error present the main questions of the case and may be argued at the same time.

The first question that must be considered is what was the relation of the appellee Steinfeld to the Nielsen Mining and Smelting Company and to Nielsen at and prior to the time when he acquired Nielsen's stock.

The facts are so clearly stated in the Fifth Section of the finding, that it would be useless to repeat them here, and they show, in the language of the findings, that Steinfeld "though neither an officer or director of said company dominated and controlled the same."

This state of dominion being thus established, it is insisted that Steinfeld, so far as Nielsen was concerned, became the corporation itself, and that any action by him became the same as if taken by the corporation in due legal form, and that by

taking this position Steinfeld assumed all the obligations which the corporation owed to Nielsen and became subject to all the relations of trust and fiduciary duty which the corporation was bound by in the corporate dealings with Nielsen. In other words, Steinfeld was under the same obligations to Nielsen that the Company was, and like the Company, sustained to Nielsen as a stockholder the fiduciary relations which arise between the corporate entity and the individual stockholders. Steinfeld's purchase of the shares is to be weighed and measured just as if the Company had in due corporate form done every act which he did, and he can reap no more advantage from his contract of purchase than the Company could, if they had done what he did and the transfer had been directed to the corporation.

If the corporation owed every duty of disclosure to Nielsen before buying his stock, then Steinfeld was under the like duty. If the legal relations between Nielsen and the corporation were those of cestui que trust and trustee, then the law placed Steinfeld in the same relations.

If the corporation could not use the property to diminish the value of Nielsen's stock and reap a benefit for its other stockholders at his expense, then the use of the corporate property for that purpose by Steinfeld cannot be legal.

If the corporation could not legally cease its operations while they were reducing the corporate debts in order to induce a minority stockholder to sell his stock to the corporation, then the doing of these things by Steinfeld by virtue of his dominance must likewise meet the condemnation of the law.

If the corporation obtained the shares by the same false representations as Steinfeld did, and the law would not permit it to retain the stock thus obtained, then Steinfeld can have no greater right to retain it than the corporation would have had.

Dominating the corporation, he can claim no privileges or immunities the company did not have, and if the dealings between a corporation and its minority stockholders are governed by the rules of law which obtain between persons in a fiduciary capacity, then the same rules of law control all dealings which Steinfeld had with Nielsen.

It is beyond question that the corporation cannot legally take any action intended to prefer one stockholder over another. It cannot give to one stockholder benefits which do not inure to all alike. It cannot use its property so as to impose burdens on one stockholder, which all do not bear alike, and being unable to do these things legally in its corporate capacity, it cannot permit its officer to do them while under the dominance of one stockholder.

The corporation is the undoubted trustee for all its stockholders and its relation is strictly that of trustee and cestui que trust. It cannot lend its aid or permit its means to be used for the personal benefit of one stockholder, to the detriment of another, and no single stockholder by his dominance of the company can be permitted to reap any benefit which might come to, or escape any duty which would rest on, the corporation, if the same action had been taken by the corporate entity.

Where a person dominates and controls a corporation, ignores or controls its nominal board of directors, and alone formulates the policy it must pursue, or pursues any course which he wills with its assets, while its majority directors yield absolutely to his dictation and permit him to do as he pleases with its property for his personal benefit, it cannot be said that the minority directors could obtai nany information by attending the directors' meetings or be charged with any notice of what the dictator had determined to do, simply because he was a nominal director.

The following authorities show the positions which the courts have taken in regard to the rights and duties of a stockholder who dominates a corporation.

Miner vs. Belle Isle Ice Co., 17 L. R. A., 412 (Mich.)

"Where a number of stockholders combine to constitute themselves a majority in order to control the corporation as they see fit, they become for all practical purposes the corporation itself and assume the trust relation occupied by the corporation towards its stockholders. Although stockholders are not partners, nor strictly tenants in common, they are the beneficial joint owners of the corporate property, having an interest and power of legal control in exact proportion to their respective amounts of stock. The corporation itself holds its

property as a trust fund for the stockholders, who have a joint interest in all its property and effects, and the relations between it and its several members is for all practical purposes that of trustee and cestui que trust. * * * *

"Where several persons have a common interest in property, equity will not allow one to appropriate it exclusively to himself or to impair its value to others. Community of interest involves mutual obligations. Persons occupying this relation towards each other are under an obligation to make the property or fund productive of the most that can be obtained for it for all who are interested in it, and those who seek to make profit out of it at the expense of those whose rights are the same as their own are unfaithful to the relations they have assumed, and are guilty at least of constructive fraud."

The case of Ervin vs. Oregon Ry. & Nav. Co., 27 Fed., 631, is also an instructive case in regard to the rights, duties and relations of the majority and minority stockholders.

In

Wheeler vs. Abilene Nat. Bank Bldg. Co., 159 Fed. 391. 16. L. R. A. (New Series) 892,

there is a masterly discussion of the principles of equity which obtain between the majority and minority stockholders of a corporation regarding the use or the sale of the corporate property, and an elaborate note is attached to the report in 16 L. R. A., 892.

The opinion was delivered by Judge Sanborn, and concurred in by Judges Hook and Adams, and the Court uses the following language:

"A corporation holds its property in trust for its stockholders. The stockholders have a joint interest in the same property and in the same title. Community of interest in a common property or title imposes a community of duty, and a mutual obligation to do nothing to impair either. It creates such a fiducial relation as makes it inequitable for any of those who thus share in a common property to do anything to, or with it, for their own profit to the detriment of others having the same right.

"The holder of a majority of the stock of a corporation has the power by the election of biddable directors, and by the vote of his stock to do anything that the corporation could do. His power to control and direct the action of the corporation places him in its shoes and constitutes him the actual, if not the

technical trustee for the holders of the minority of the stock. In effect he holds an irrevocable power of attorney from the minority stockholders to manage and to sell the property of the corporation for himself and for them. Times, places and notices of meetings of the directors and of meetings of the stockholders become of secondary importance because the presence, the vote and the protest of the holders of the minority of the stock are unavailing against the will of the holder of a majority. They can act and contract regarding the corporate property, they can preserve and protect their interests in it only through him and through the courts.

"This devolution of unlimited power imposes on a single holder of the majority of the stock a correlative duty—the duty of the fiduciary or agent to the holder of a minority of the stock who can only act through him, the duty to exercise good faith, care and diligence to make the property of the corporation produce the largest possible amount, to protect the interest of the holders of the minority of the stock, and to secure and pay over to them their just proportion of the income and of the proceeds of the corporate property. Any sale of the property of the corporation by him to himself for less than he could obtain for it from another *or any other act in his* interest to the detriment of the holders of the minority of the stock, renders the sale or act voidable at the election of the minority stockholders and invokes plenary relief from a court of chancery.

"The reason for this rule is the detriment to the holders of the minority of the stock, and not the benefit the holders of a majority derive therefrom."

From these decisions, it would seem clear that Steinfeld by his dominance of the corporation through his ownership of a majority of the stock and his own control of the directors, placed himself in exactly the same position that the corporation occupied, and was subject alike to all the duties and disabilities which inured to the corporation, and the corporation holding an undoubted position of trust and fiduciary relation to Nielsen, he likewise sustains the same relations.

Steinfeld stood in all the fiduciary relations and was subject to the disabilities of a director or managing officer.

Under the facts as shown by the findings Steinfeld usurped and used with the consent of a majority of the directors all the powers of the Board of Directors, and by this action, and be-

cause of such dominance, he became the dictator of the corporation and was subject to all the restrictions of an actual director in his dealings with the stockholders as well as with the corporation.

He was thus clearly placed in a position of trust and confidence with regard to the corporation and sustained the same relations to the individual stockholders which he would have held if he had been l[illegible]ally as well as actually the controlling officer of the corporation. It therefore becomes material to enquire what are the relations which an officer of a corporation sustains to the individual stockholder in regard to the purchase of his stock. It is strenuously contended by the appellee that there is absolutely no relation of trust or confidence in regard to the sale of stock. The cases relied on for this contention are:

Carpenter vs. Danforth, 52 Barb. 581, decided in 1868;
Tippacanoe Co. vs. Reynolds, 44 Ind. 509, decided in 1873;
Denderick vs. Nelson, 67 Tenn. 108, decided in 1874;
Grant vs. Attrill, 11 Fed. 469, decided in 1882;
Gillett vs. Brown, 23 Fed. 627, decided in 1885;
Haarstick vs. Fox, 33 Pac. 251, decided in 1893;
Walsh vs. Guilder, 90 N. W. 406, decided in 1902;
Hooker vs. Midland Steel Co., 215 Ill. 444.

These cases hold that *in the absence of fraud* the directors of a corporation sustain no such relation of trust, which renders it incumbent on them to make full disclosure of all facts within their knowledge before purchasing the stock of a stockholder who is ignorant of these facts.

These cases are based on the idea that the property of a corporation belongs to the fictitious legal entity, and that officers and directors are the agents and trustees of this body and not of the stockholders; that the title to the stock is in the individual stockholder and that over the disposition of the stock neither the corporation or its officers have any control, and consequently owe no duty to its owner, and on the technical ground is founded a trusteeship for the legal entity, with the right of the corporation to hold the director to account for any

proper use of the corporate property ,or the failure to perrm a duty owing to it, while it denies to the stockholder the ght to hold the director responsible for a failure to use good ith in regard to a disposition of the stock.

The cases relied on are based on the cases of Carpenter vs. anforth *supra,* and Tippacanoe Co. vs. Reynolds *supra.* The st of these cases was criticized and disapproved by the comntator to Story's Equity Jurisprudence (12 Ed. page 229.b.) d is diametrically opposed to the rule declared in Pomeroy . Jr. (2nd Ed.) Sec. 1090, where the question is discussed th great ability, and the true doctrine is thus stated:

"So far as the trust embraces or are concerned with the corrate property, the directors and managing officers occupy e positions of *quasi trustees* towards the corporation only: ere is no relation of beneficiary and trustee, having the corrate property for its subject matter, between the stockholder d the director. * * * * On the other hand the directors d managing officers of the company occupy the position of *asi trustees* towards the stockholders alone, and not at all wards the corporation, with respect to their shares of stock. nce the stockholders own these shares, and since the value ereof and all rights connected therewith are affected by the nduct of the directors, a trust relation plainly exists between e stockholders and the directors which is concerned with and nfined to the shares of stock held by the stockholders. From arise the fiduciary duties of the directors towards the stockolders in dealings which may affect the stock and the right of e stockholders therein, and their equitable remedies for a olation of these duties. To sum up, directors and managing ficers in addition to their functions as mere agents, occupy a uble position of partial trust, they are quasi or sub modo ustees for the corporation with respect to the corporate propty, and they are quasi or sub modo trustees for the stockolders with respect to their shares of stock. * * * * Whener the acts of the directors do not consist of any wrongful isuse of the corporate property or wrongful exercise of corrate franchise but are of such a nature that they directly and imarily affect the interest of the stockholders in their shares stock by diminishing its value, or otherwise impairing their oprietary right in it, then the stockholders are directly inred, and are primarily interested as the cestui que trustents ose rights have been violated. They must institute and main-in any equitable suits for the benefit and the relief belongs them alone."

Speaking of the case of Tippacanoe Co. vs. Reyonlds *supra* in Bigelow of Fraud, Vol. 1, page 331, the author says:

"The court was perhaps correct in holding that the president of the company was not in strictness a trustee towards the vendor, but it is quite another thing to say that no relation of confidence or trust existed between the parties and that is all that is necessary to require disclosure."

It is material to observe that the case of Tippacanoe Co. vs. Reynolds *supra* was decided by a divided court, the Chief Justice dissenting.

In August, 1903, this question came before the Supreme Court of Georgia in the case of

Oliver vs. Oliver, 45 S. E., 232.

The Court uses this language:

"And this brings us to a consideration of the relations which a director bears to an individual stockholder. All the authorities agree that he is a trustee for the company and in his capacity as such he serves the interests of the entire body of stockholders as well as those of the individual shareholder who usually cannot sue in his own name for wrongs done the company by the officer. But the fact that he is trustee for all is not to be perverted in holding that he is under no obligation to each. The fact that he must serve the company does not warrant him in becoming the active and successful opponent of an individual stockholder with reference to the latter's individual interest in the very property confided to his care. That he is trustee for the corporation is not intended to make the artificial entity a fetish to be worshipped at the sacrifice of those who in the last analysis are the real parties in interest. No process of reasoning, no amount of argument can destroy the fact that the director is in a most important and legitimate sense trustee for the stockholder. Not a strict trustee, since he does not hold the legal title to the shares nor even a strict trustee who is practically prohibited from dealing with his cestui que trust, but a quasi trustee as to the shareholder's interest in the shares.

"Where the directors obtain information giving added value to the stock, by virtue of his official position he holds the information in trust for the benefit of those who placed him where the knowledge was obtained in the well formed expectation that the same should be used first for the company, and ultimately for those who were the real owners of the company. The director cannot deal in this information to the prejudice of the artificial being which is called the corporation, nor on any sound princi-

ple can he be permitted to act differently toward those who are not artificially but actually interested."

Commenting on the case of

Tippacanoe Co. vs. Reynolds *supra*

the court notes the dissent of the Chief Justice in that case, and shows that the case has been doubted by Mr. Thompson (3 Tomp. Corp. 4034) and by Pomeroy when he holds that "the directors are quasi trustees for the stockholders with respect to these shares" and proceeds:

"If they are any sort of trustees, they are necessarily subject to the obligations and restrictions which inhere in that relation as to the property intrusted to them. The shares are but the paper evidence of the interest which the stockholder has in the property under the control of the directors. In their sale, the stockholder disposes not only of the lithographed or engraved script but of his holdings in property. And when a director deals with a stockholder for the purchase of shares he is not buying paper but in effect is buying an undivided and substantial interest in property, which has been committed to the director's care, custody and control. Equity abhors mere names and looks to the substance. Whether the corporation be treated as an enlarged and amplified form of partnership and the director as managing partner, or whether he is called an agent or a trustee, elected by the stockholders to represent them in the management of the concern, he occupies a fiduciary position and is essentially within the rule which requires agents, attorneys, bailees, partners, trustees and other fiduciaries to exercise the highest degree of good faith in all matters connected with the property committed to their care.

"It is common knowledge that the market value of shares rises and falls not only because of an increase or decrease of tangible property, but by reason of real or contemplated action on the part of the managing officers; upon declaring or passing of dividends; upon the making of fortunate or unfortunate contracts, the loss or gain of property in dispute; or profitable or disadvantageous sales or leases; and to say that a director who has been placed where he may himself raise or depress the value of the stock, or in a position where he first knows of facts which may produce that result, may take advantage thereof and buy or sell to one whom he directly represents without making a full disclosure and putting the stockholder on an equality of knowledge as to these facts, would offer a premium for faithless silence and give a reward for the suppression of the truth. It would sanction concealment by one who is bound to speak and

permit him to take advantage of his own wrong—a thing abhorrent to a court of conscience.

"It is conceded that the position which the director occupies prevents him from making personal gains at the expense of the company or of the whole body of the stockholders, but the rule that he is not a trustee for the individual shareholders invariably leads to the conclusion that while a director is bound to serve stockholders en masse, he may antagonize them one by one, that he is an offiner of the company, but may be the foe of every private in the ranks. When it is admitted, as it must be, both from the very nature of his duty and from the rulings in nearly all of the cases that he is a trustee for the stockholder, how is it possible to draw the line and say that while trustee for some purposes, he is not for others immediately connected therewith; that the incident of the trust relation stops short at the very point where it is vitally important for the shareholder that they should become active. For it must not be forgotten that the right of good faith in dealings concerning the stock is one of the few which the individual shareholder is in a position to assert in his own name. Except in a few other instances, the company itself is the only proper party to enforce the obligations arising from the trust relations of the director. In contracts with reference to the shares the stockholder himself can enforce the rights arising from the quasi trust. * * * * Here at least the beneficiary may be off his guard and may rely implicitly not only on what is said, but also on the supposition that nothing important will be left unsaid by the officer. Having previously trusted the director in the management of the company, he is not required, when selling him his shares, suddenly to exhibit entire want of confidence. And directors generally recognize the obligation imposed and act accordingly. But the peculiar powers and special opportunities call for an enlargement rather than a restriction of the rule requiring a disclosure."

The same question came before the Supreme Court of Kansas in June, 1904, in the case of

Stewart vs. Harris—Kansas—66 L. R. A., 261.

An elaborate brief was filed for the position here contended for by the appellees, including most of the decisions in his brief, in in the Supreme Court of Arizona, and the case being one of first impression in that State, the Supreme Court fully discuss the point involved, and in considering the case of Tippacanoe vs. Reynolds *supra* use this language:

"This is the leading case cited and relied on by the plaintiff in

error as authority for the claim that the instruction under consideration, given by the court, does not correctly state the law. It was in that case held that there was no relation of trust between the president and director of a corporation, and a stockholder of the corporation, that in the *absence of actual fraud* a purchase of stock by the former from the latter was valid, though in his official position the president knew at the time he purchased the stock it was worth more than its nominal market value, but did not disclose to the stockholder the facts within his knowledge as to the real value. The opinion was by a divided court in 1873. It is bottomed upon the view announced by the court that while the managing agents of a corporation are trustees for the corporation, they sustain no trust relation to the stockholders of the corporation, and owe them none of the duties of the trust relation. Other cases are cited taking the same view, and apparently following the Indiana case, the pioneer case to announce the doctrine. The rule laid down in Indiana has met with much criticism. The position taken by the court leaves the stockholder's interest in the corporation, and all matters affecting its value, wholly in the charge and keeping of the managing officers of the corporation, and leaves the stockholders of the corporation their legitimate prey. We cannot give the sanction of our approval to the views expressed by the Indiana Court in that case. The fact that the directors and managing officers are quasi trustees for the stockholders does not prohibit them from dealing with the stockholders. The only restriction is that in such dealings their conduct must be fair, open and above reproach. Because of the trust relation and of the better opportunities for acquiring information, before any director or managing officer having a knowledge of the condition of the affairs of the corporation can rightfully purchase stock of one not actively engaged in the management of its affairs, such director or managing officer must inform the stockholder of the true condition of the corporation."

Replying to the argument that the books of the company were open to the stockholder and that investigation would have revealed the true situation, the court decides that the stockholder was not required to make an examination of the books simply because he had the power to do so, and was entitled to rely on the belief that the director would disclose to him the true condition of the bank, and conclude:

"It is not the intent of the law to place a restraint on the affairs of business when conducted fairly, honestly and openly, nor to deprive one party to a contract of the advantage which

superior judgment, greater skill or better information may give, but it cannot give its approval to a course of dealing which will permit those occupying a trust relation to be unmindful of the trust, betray the confidence reposed, and profit by such betrayal."

The trend of modern authority is in the direction of extending rather than narrowing the equitable remedies of the parties in interest against the directors and managing officers of corporations, and the Supreme Court of the United States has been prominent in the application of equitable remedies for corporate wrongdoing no matter what form that wrongdoing might take.

Speaking on the subject, the Supreme Court of the United States say in

Jackson vs. Ludeling, 21 Wall. 616:

"The managers and officers of a company whose capital is controlled in shares are in a very legitimate sense trustees alike for its stockholders and its creditors, though they may not be trustees technically and in form."

Judge Sanborn in Jones vs. Electric Co., 144 Fed., 765, uses this language:

"The relation of a stockholder to his corporation, to its officers and to his co-stockholders is one of contract and of confidence."

In Olney vs. Cincinnati Land Co., 5 L. R. A. 361, discussing the relation of directors to the stockholders and creditors of a corporation, the Court say:

"While the decisions in regard to this relation are not harmonious, it has been generally agreed that directors are trustees for stockholders."

In McCourt vs. Singers Bigger, 145 Fed. 103, the Court says:

"Before disposing of the main question, a preliminary consideration of the obligations and duties imposed by law upon directors of a corporation may not be unprofitable. Whatever may be the technical relation between them and the corporation itself, its creditors or the public, they are in a general and universal sense trustees for the stockholders. They are chosen to represent them in the enterprise upon which they mutually embark. Their duty is to use and employ the corporate assets and all corporate facilities and privileges within the limits of powers conferred upon the corporation by law for the ultimate benefit and advantage of the shareholders. They have no rights

in such assets or facilities or privileges superior to those of their principals. They occupy towards them strictly fiduciary relations and are accountable to them on the principles governing that relationship."

"That a director of a joint stock corporation occupies one of those fiduciary relations, where his dealings with the subject matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care are viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality and which has received the clearest recognition in this court and in others." McIntyre vs. Ajax Mining Co. (Utah) 53 Pac. 1127.

The Kansas and Georgia cases above quoted are the last expressions of the courts of last resort in the States where the question is one of first impression. They express in forceful terms the true equitable doctrine of the relations of the officers and stockholders of a corporation. They remedy a crying evil in the business world. They take from the corporation its most justly criticized fault, the supposed ability by its use, for the big or the unscrupulous to absorb or destroy the small or the confiding. They strip from the man who abuses trust and overreaches the confiding, the fruits of his breach of trust relations. They interpose no unfair or oppressive hindrances to business, and they only call for the requisites of common honetsy. They are not based on technical ideas of titles or of property, but on the broad principles of equity. They announce no new doctrine, but simply apply the principles, as old as equity itself, that where confidence is reposed, or power conferred or usurped, the trust must not be betrayed or the power abused. They pronounce no judgment save the ancient one that no man must profit by his own wrong.

THE FINDINGS SHOW FRAUD.

It next becomes material to examine the findings to ascertain if they show actual or legal fraud.

Admitting for the purposes of this argument alone that Steinfeld sustained no trust relation with Nielsen in relation to the purchase of his stock, it is earnestly contended that the conduct of Steinfeld shows actual fraud and oppression.

All the cases cited by appellees only go to the extent of saying that *in the absence of fraud* there is no trust relation and no duty to disclose. The citation from Cook on Corporations (5th Ed.) Sec. 320, states the rule thus:

"There is no confidential relation between him (the director) and a stockholder, so far as a sale of the stock between them is concerned, and so long as he remains *silent* and does not actually mislead the person with whom he deals, the transaction cannot be set aside for fraud."

This is equivalent to a declaration that if the director actively misleads a stockholder and buys his stock, then the transaction may be set aside *for fraud.*

There can be no doubt that Steinfeld did not remain silent. He formed the design to acquire the stock, and the findings set out in full his letter of January 3, 1900, to Nielsen (Record, page 31), in which he gives his reasons for closing down the mine and smelter. In that letter he stated his decision was reached after careful consideration, and in it he states as a fact that little headway is being made towards the liquidation of the large indebtedness of the company. The statements in his letter are not in the nature of opinions, they are positive statements of fact made in his own language after "careful consideration."

The Court further finds (page 32 of record) "that at and prior to the time that said Steinfeld wrote said letter, the mine and smelter of said company were running at a considerable profit, and the debt due from said company to the firm of Zeckendorf & Company was being substantially reduced, and that these facts were known to Steinfeld at the time he wrote and sent the said letter to Nielsen."

"That at the time he wrote said letter, the said Steinfeld had made up his mind to shut down said mine and smelter for the purpose of acquiring the interest of said Nielsen in said corporation, and for the purpose of acquiring a certain adjoining group of mines known as and hereafter referred to as the English Claims, before proceeding with the further development of the Old Boot Mine, and wrote said letter in pursuance of his said purpose."

There is the further finding on page 33 of record: "That at the time said Steinfeld had such mine shut down, he was in-

formed of the value of the Old Boot Mine, and of the value of the adjoining properties thereto, and did not shut down said mine and smelter because of the very large indebtedness existing against said company, and the fact that little progress was being made towards its liquidation, or because it was running deeper and deeper in debt to L. Zeckendorf & Company, or because the ore was exhausted, but shut down the same solely and exclusively for the purpose of getting rid of the said Nielsen as a stockholder in said corporation and to acquire his said stock, and for the purpose of acquiring the English group of mines."

There is thus shown a false statement, deliberately and knowingly made in regard to the effect of the operations of the mine and smelter and made for the purpose of "getting rid of Nielsen as a stockholder and to acquire his stock."

This letter is followed up by the discharge of Nielsen as Superintendent, and in order to further deceive him, the records of the company are falsified so as to show his discharge at a meeting which never was in fact held. It is found by the court that "at the time Steinfeld undertook to discharge Nielsen, he had not been authorized by the Board of Directors to do so, and had not consulted with said Board, and the said Board had not in any way authorized anyone to discharge Nielsen as such Superintendent" (Record, page 32), and the findings further show that subsequently the directors, for the purpose of making it appear that Steinfeld has authority to discharge said Nielsen, caused to be entered on the records of the corporation, under a fictitious date, a resolution discharging him, and at a subsequent meeting, knowing its absolute falsity, another resolution is adopted by the same directors approving the former action of the Board, when they well knew that no such meeting had ever been held.

There could be but one purpose for such action, and that was to deceive Nielsen and to induce him to sell his stock.

On about the 19th of February, 1900, Nielsen, in the language of the finding (Record, page 33) "believing that he had been regularly discharged as superintendent by the Board of Directors, and believing the statements of said Steinfeld in his letter of January 3, 1900, and having all his means invested in

the company, and the existing supply of coke then at the smelter being exhausted, and the said Nielsen being powerless to obtain supplies to run said mine and smelter, and all the assets of the corporation being under the control of Steinfeld, did shut down the mine and smelter and cease to be in possession and control thereof."

After Nielsen is out of possession of the property of the Company, Steinfeld proposes to buy his stock, telling him in these negotiations "that if he did not take the offer of the said Steinfeld, he would get nothing for his stock" (Findings, page 34 of Record) and the finding also shows "that at the time the said Steinfeld was negotiating with Nielsen, the said Nielsen was in financial distress, and was without means, and this fact was known to said Steinfeld at the time."

Under these circumstances, the contract of June 29, 1900, Record pages 34, 35 and 36, is made and the stock is turned over to Steinfeld. The Court found that Nielsen, at the time "he signed said deeds and executed said contract and made the said transfer of the stock in the Nielsen Mining and Smelting Company did not know that the said Steinfeld had shut down said mine and smelter for the purpose of getting rid of Nielsen and acquiring his stock, and did not know that said mine and smelter had been shut down while the same was making money, in order to enable said Steinfeld to acquire the English Group, and did not know that Steinfeld had no authority from the Board of Directors to discharge the said Nielsen, or that the record in the minute book of the Company showing his discharge by said Board of Directors on or about February 1, 1900, was false and that no such meeting of the Board of Directors was ever in fact held, but the said Nielsen believed that he had been duly and legally discharged and that the said Steinfeld had shut down said mine and smelter for the reasons stated in his letter of January 3, 1900, and acted and relied on such belief." (Record, page 36.)

These findings thus show a false representation in regard to matters affecting the value of the stocks made to induce the sale and deceive Nielsen. They also show that Nielsen was deceived, and sold and transferred his stock, acting and relying

on the truth of these representations, and died without ever having ascertained the truth.

In addition to these matters, the consideration for the sale was the contract of June 29, 1900. Not a dollar or anything of value was paid in addition to the contract. This contract is set out on pages 34 and 35 of the record. It purports to be the contract of the Nielsen Mining and Smelting Company as well as that of Steinfeld, but the unquestioned proof is that it was never authorized by the board of directors or by the stockholders, and was signed by the President without any authority and solely at the request of Steinfeld, and the company received absolutely no benefit from it. This contract presents the spectacle of the president and the dictator and chief stockholder of a corporation solemnly agreeing to use the assets of the company for the benefit of Steinfeld without the possibility of any benefit to the company. It is an agreement for the company to pay for property which Steinfeld swears he bought for himself, and in which he declares the company has not and never had any interest. The contract is so plainly fraudulent as to the company and so far beyond the power of Curtis to make, and so violative of the duties which Steinfeld and Curtis as stockholder and president respectively owed to the company, that there can be no doubt that the corporation was not and could not be bound by it. It is a plainly illegal use of the company's assets, made by the president without a shadow of legal authority and is certainly not binding on the company. The contract being without binding force on the company could afford no valuable consideration for the stock. Again the contract fixed no time within which the company should sell or operate its mines, and any payment is made contingent on the happening of one of these conditions, and it contained no promise that either would ever be done. The only sale which would render Steinfeld liable under the contract is carefully confined to a sale consummated by the corporation. He is left at liberty to compel a sale to pay his debts without any liability to pay anything to Nielsen for the stock. Steinfeld parted with not a dollar for the contract and transfer of stock to him, incurred no fixed liability, and made no absolute promise of a sale. The provision of the contract that the company would pay the con-

sideration out of the net profits was another promise voidable on attack, for it bound the company to use the assets for the exclusive use of Steinfeld, and for a consideration which moved exclusively to him. It was simply a promise by Curtis to make another unlawful use of corporate assets for Steinfeld's use, and it was alike a fraud on the company and an illegal use of the property and a cheat to Nielsen, as the money thus paid would have belonged to him in proportion to the value of his stock. It was a promise to pay him in money which was thirty per cent. his own. The Court has found that this contract was an inadequate consideration for the transfer of the stock at the time it was made (Findings 11, page 38), and that Steinfeld then knew it was not an adequate consideration at the time he obtained the transfer.

It is further found that Nielsen was in necessitous circumstances, and that Steinfeld told him that if he did not take what was offered, he would get nothing.

These then are the circumstances under which he obtained the transfer.

He thereupon has a new certificate issued to him as trustee, and the stock stands in his name as trustee now.

After the death of Nielsen, Steinfeld continues his policy of paying nothing. He acquired the English Group of mines, taking the titles in his own name, and in May, 1903, he sold both the Old Boot Mine and the English Claims to the Imperial Copper Company for $515,000, and the entire proceeds became the property of the Silver Bell Copper Company. Of the consideration $115,000 was received in cash.

Though his contract bound him to pay Nielsen within "thirty days after such sale is completed," Steinfeld never paid anything on the contract until January 23, 1904, when he paid Mrs. Nielsen the sum of ten thousand dollars and took the release which is set out in the findings on page 37 of Record.

On the 20th of January, 1904, the Board of Directors, which then consisted of Curtis, Shelton and Steinfeld, declared a dividend of $111.00 per share, and Steinfeld received of this dividend the sum of Thirty-three Thousand, Three Hundred Dollars on the stock which he had obtained from Nielsen, and

which then stood in his name as trustee, and had the same in his possession when he paid Mrs. Nielsen the ten thousand dollars on the contract and took her release individually and as administratrix of Nielsen's estate.

The Court found "that at the time Steinfeld so paid the sum of money to Mary Nielsen, he did not inform her of the price at which the property of the Silver Bell Company had been sold, nor any of the terms of payment or any details thereof, and did not inform her and she did not know that the said Silver Bell Copper Company had declared a dividend of $111.00 per share on its capital stock and did not inform her that he, the said Steinfeld, had received and then had in his possession the sum of thirty-three thousand, three hundred dollars, as dividends on the 300 shares of stock which he had obtained from Carl S. Nielsen as aforesaid." (Record, page 38.)

"That the contract for the payment of the sum of ten thousand dollars at the times and under the conditions provided in said contract was not an adequate consideration for said three hundred shares of stock, and that the said Steinfeld knew at the time he obtained the execution of said contract and the transfer of said stock that the said contract was not a fair consideration for said stock and at the time the said Steinfeld paid the said sum of ten thousand dollars to the said Mary Nielsen the said sum was not a fair value of said stock but the same was a grossly inadequate price for the said stock, all of which Steinfeld knew." (Record, page 38.)

It was further found "that at the time Mary Nielsen received the money and executed the receipt and release, she did not know of the falsity of Steinfeld's representations to her husband, or the amount he had received on a sale of the property of the company, or that he had received the dividends on the stock, and that Steinfeld knew of all these things and did not disclose them to her," and that the "said Mary Nielsen was ignorant of the facts above set out and received said sum of money and executed and delivered the said receipt and release, believing that the agreement of June 29, 1900, was a valid and binding contract, and that she and the estate of Carl S. Nielsen were bound thereby, and that she did not discover the truth in relation to the matters set out in the 13th finding until within less than one year before the bringing of this action." (Record, pages 38 and 39.)

These findings thus show a corporation organized at Steinfeld's suggestion, officered as to a majority of its directorate, by two of his puppets. They show that he paid not one cent for his stock in the company, and that the company never received a dollar from him save as a lender. It is shown that he dominated the corporation completely, and controlled both its policy and its property as he desired. It is shown that, though he had acquired more than half of the stock for nothing and had allowed Curtis to obtain 170 shares without any consideration either to the company or to Nielsen, he formed the design of getting rid of Nielsen as a stockholder and to acquire his stock, and in order to carry out this design to acquire the stock for his own benefit, he made statements which he knew were false in order to induce Nielsen to sell, used his dominion over the company to shut down its plant in order to enable him to carry out his purpose, though the company was in debt to him, and then, knowing that Nielsen was dependent on his compensation as an employee of the company, he undertakes to discharge him, and his dummies write falsehoods in the record of the company to make it appear that he had authority for his action. Having made up his mind to this course, he writes Nielsen a letter giving false reasons for his course, and having thus deceived him and deprived him of employment, he goes to him seeking to buy his stock, telling him that, if he does not take his offer, he can get nothing, and buys his stock for a contract which imposed no personal liability on him, except in a remote contingency, and had no definite or certain time of payment, and selling the property of the corporation, in which both were stockholders, he conceals the price from Nielsen's widow, draws the dividends on the stock, and pays her less than one-third of what he had received as dividends, and defers the payment until nearly nine months after he had completed the sale of the property, and conceals every fact which might influence her at the time he makes the payment.

His course was actuated by greed from the beginning. He skilfully provides for a complete mastery of the corporation, and carefully conserves his interests as a creditor of the same, and when it becomes evident that the stock of Nielsen will be valuable, he forms the design to acquire it for his personal

enefit. In furtherance of this design, he writes falsehoods as
o his reasons for his abuse of the property of the corporation,
eprives Nielsen of his employment, and while Nielsen is thus
eceived, he purchases his stock with a contract which the
ourt finds was not then a fair price for the stock. He has
is directors falsify the records of the company to deceive Niel-
en, and has the President of the company sign a contract to
se the property of the company to obtain the stock for him-
lf, without authority of the company and without a cent of
enefit moving to it, and when the property of the company is
ld, he keeps the dividends he had received on the stock, and
ter an unwarranted delay, pays the widow of the man he had
duced to sell the stock in the hour of his financial distress,
rought about by Steinfeld's own act, less than one-third the
m he had received as dividends on this stock, and does this
ithout informing her of the amount received from the sale of
roperty of the corporation, and leaves her in ignorance of the
vidends he held and out of which he paid her.

No amount of sophistry can clothe this transaction in gar-
ents of innocence. No oratory can lend even the appearance
fairness to the bare recital contained in the findings, and no
stem of law or of morals can condone it. It was born in
eed, nursed in covetousness, nourished on deceit and false
presentations, and fruited in oppression and falsehood. It
s none of the elements of fairness, it shows no faith kept, no
omise performed, no duty observed. It is marked by mis-
presentation and false entries in records, and its results are
atSteinfeld, who paid not a dollar for his stock, devoted no
rt of his time to the legitimate business of the company, and
s paid principal and interest every dollar that he advanced
a creditor, all which belonged to the firm of Zeckendorf &
mpany, becomes the owner in his own name, in addition to
e stock which belonged to his firm, of nearly a third of the
operty of a corporation whose property sold for more than
lf a million dollars, at a cost of ten thousand dollars paid
er he had three times that amount in his pockets as divi-
nds on this very stock.

There are none of the elements of fairness in this situation,
re was no free consent to the contract. It was executed in

ignorance of the deceits and misrepresentations and in the belief that he had been told the truth. It was extorted by threats and under circumstances of oppression. It has an inadequate consideration when made, and when discharged the payment is grossly inadequate to its value. It cannot be said in any sense to be fair, it is in law, it is in fact *a fraud.*

THE LAW IS ERRONEOUSLY STATED IN THE OPINION OF THE SUPREME COURT OF ARIZONA.

The remaining assignments of error relate to the rules of law laid down by the Territorial Supreme Court and its application to the facts so found. They will be argued as they follow each other in the opinion.

The opinion on page 66 of the record, after sustaining the rule laid down in the cases of Stewart vs. Harris, 69 Kansas, and Oliver vs. Oliver, 45 S. E. 232, says:

"The difficulty in applying that rule in this case is that Nielsen was himself an officer and director of the company and as such presumptively informed of the condition of the mine, of its value and future prospects and of the condition of its affairs. It is certainly a fair presumption of facts that the manager and director of a mining corporation would be as familiar with the affairs of the company and with its property as any other member of the corporation."

The vice of this reasoning as applied to the facts of the case is evident when attention is called to the findings of the court below. In the 9th finding it is expressly found by the court that at the time Nielsen signed the deeds and executed the contract for the sale of the stock, and made the transfer of said stock in the Nielsen Mining and Smelting Company, he "did not know that the said Steinfeld had shut down said mine and smelter for the purpose of getting rid of Nielsen and acquiring his stock and did not know that the said mine and smelter had been shut down while the same was making money in order to enable the said Steinfeld to acquire the title to the English group, and did not know that the said Steinfeld had no authority from the board of directors to discharge said Nielsen or that the record in the minute books of the company showing his discharge by said board of directors on or about the first day of

February, 1900, was false, and that no such meeting of the board of directors was ever in fact held, but the said Nielsen believed that he had been legally and duly discharged, and that the said Steinfeld had shut down said mine and smelter for the reasons stated in his letter of January 3rd, 1900, and *acted and relied on such belief.*" (Record, page 36.)

In the face of this finding, there is absolutely no room for *presumption* that Nielsen knew the true state of affairs, and the Supreme Court had no basis on which to found the presumption of knowledge on which it denies him relief.

It is a paltering with words and an evasion of the issue made by the facts in this case, to talk of a presumption which might fit some other case, which might arise between directors in a corporation which was not dominated and controlled by one not a director, when the court below has found that the facts on which the presumptions set out in the opinion might lawfully be indulged, did not exist, and that the board of directors were but the puppets of Steinfeld, who registered his will, and that they did anything which he said do.

It is a waste of legal knowledge to state the presumptions which might be drawn from a state of facts which the record does not disclose, and to attempt to apply these presumptions in such manner as to negative the findings of the Court. It is a waste of words to talk of what Nielsen is presumed to have known, when the court has found in express words that he *did not know* these very things.

Continuing, the opinion says:

"It may be true that Nielsen was misled by the statement of Steinfeld that the mine at the time of the closing down was not being operated at a material profit, but if he relied upon the statement, it does not appear that his means of ascertaining the true condition of the affairs of the company was not at hand, and the truth was readily ascertainable."

The fact that Nielsen was misled, and actively and intentionally so, by Steinfeld's statement, in this regard, is found by the Court.

It is a novel proposition of law that a person deceived and defrauded shall be denied relief, unless it appear that his means of ascertaining the true condition of the affairs of the

company were not at hand, and the truth readily ascertainable.

The doctrine asserted would arm every worker of deceit and fraud with a perfect defense, unless the person defrauded showed that there was no means open to him to ascertain the truth. It would deny to anybody the right to rely on a statement made by another where investigation would disclose the deceit. The law never sanctioned any such doctrine.

If a man wilfully deceives another by a false statement, and he is benefiitted and the other damaged, by that person relying and acting on his statement, he cannot be heard to say: "You had no right to rely on my statement, you should have investigated yourself, and you would have then found out I was trying to defraud you." Such a rule gives a premium for deceit, and yields a reward for the suppression of the truth. It is fatal to all the confidences which men repose in each other, and strikes at the very root of good faith.

The rule there declared compels the deceived party, not only to show that the statement was false and made with fraudulent intent to deceive him, and that he was deceived to his injury, but compels him to show, as a condition precedent to relief, that investigation would not have disclosed the truth. Why should the law be thus tender of the party who defrauds and deceives and profits by it, who deliberately makes statements that are false for the purpose of effecting his object and obtaining a benefit at the expense of the party deceived, and withhold restitution to one whose only fault was that he trusted not wisely but too well?

The following decisions show the true rule of law where a false representation is deliberately made.

"Where a representation is made of a fact that has nothing to do with opinion, and is peculiarly within the knowledge of the person making it, the one receiving it has the absolute right to rely on its truthfulness, though the means of ascertaining its falsity are fully open to him. It does not lie in the mouth of the declarant to say that it was folly in the other party to believe him."

Gammi vs. Johnson, 1 Southwestern (Ark.) 610.

"When the party intentionally or by design misrepresents a material fact, or produces a false impression in order to mis-

lead another, or to entrap or cheat him, or to obtain an undue advantage of him, in every such case there is a positive fraud in the truest sense of the term, there is an evil act with an evil intent, and misrepresentations may be as well by deeds or acts as by words, by artifices to mislead as well as by positive assertions."

Story Eq. Jr., Sec. 192.

"The gist of the action (action for deceit) is fraudulently producing a false impression upon the mind of the other party. If this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or the concealment or suppression of material facts not equally within the knowledge or reach of plaintiff."

Stewart vs. Wyoming Cattle Co., 128 U. S. 383.

"One who perpetrates a fraud is not to be heard to say that the others might have ascertained the truth by inquiry."

Labbe vs. Corbett, 69 Tex. 509.

"As between the original parties, one who has intentionally deceived the other ought not to be heard to say that the other ought not to have trusted him."

Erickson vs. Fisbee, 51 Minn.

The true rule in cases of intentional misrepresentation is elaborately discussed in the note to the case of

Fargo Gaslight & Coke Co. vs. Fargo G. & E. Co., 4 North Dakota 219,

as that case is reported in 37 L. R. A. 593.

In the opinion in that case is the following language:

"That would indeed be a strange rule of law which, when the seller has successfully entrapped his victim by false statements, and was called to account in a court of justice, would permit him to escape by urging the folly of his dupe for not suspecting that he the seller was a knave. In the absence of such a suspicion it is entirely reasonable for one to put faith in the deliberate representations of another.

* * * * * *

The unmistakable drift is towards the just doctrine that a wrong doer cannot shield himself from liability by asking the law to condemn the credulity of his victim."

See also Morrow vs. Bonebrake, 84 Kansas 724.

"When, however, he (a director) misrepresented material facts within his knowledge as a corporate official, and the vendor relies on them to his damage, the rule is that he is liable."

Carpenter vs. Danforth, 52 Buck 581.
Tippacanoe Co. vs. Reynolds, 44 Ind. 509.
Johnson vs. Kirby, 65 Cal. 482.
Crumbaar vs. Griffith, 151 Penn St. 223.

"But if the seller makes positive false and fraudulent representations as to the financial condition of the company or other material facts affecting the value of the stock with the intent that they should be relied on, the purchaser is not precluded from rescinding or recovering damages by the fact that he could have ascertained the truth from the officers of the company or by other inquiry or investigation."

Redding vs. Wright, 49 Minn. 322.
Monnell vs. Kerr, 57 Mo. 478.
Olcott vs. Bolden, 50 Neb. 779.
Edelman vs. Latshaw, 36 Atl. 926.

The rule asserted in the opinion of the Supreme Court of Arizona is at war with the doctrine that power carries with it responsibility, and that the man who dominates and controls a board of directors must use such domination and control for the benefit of all the stockholders alike and not for his personal benefit. When Steinfeld assumed to take complete control of the destinies of the corporation and to use its property to further his own ends, the law placed him, whether he willed it or not, in the position of a trustee, and forbade him to profit save in the like way that all profited. When he chose without consulting the board of directors to stop the operations of the company, the least that could be expected and required of him was that he should act for the benefit of the corporation, and not exclusively for his own.

By what alchemy was Nielsen, because he was a director, to become possessed of the knowledge of the intentions of Steinfeld, who was not a director and who did not find the board of directors a necessary means of controlling the corporation. He made his ipse dixit the law of its being, and the directors were so subservient that they falsified the records of the company to sustain his discharge of Nielsen.

Is there any proof or any inference to be drawn from the findings that Steinfeld informed any director at any time of his intention to acquire the stock for himself before he did so, or

that any director, by virtue of his position as such, became possessed of such information?

Is there any basis in the findings for a presumption that the board of directors ever really directed the policy of the company? And yet it is on the idea that Nielsen, simply because he was a director in a hopeless minority, should be *conclusively* held, in opposition to the finding, to be informed of everything which Steinfeld intended, though uncommunicated to any of the directors, that Justice Doan bases his opinion denying him relief.

Again the court says:

"Further, as a director it must be presumed that he was familiar with the plans of the corporation for the future working and development of the company's properties, and that if the acquisition of other properties were essential to those plans, have known of it."

This part of the opinion assumes that there was a policy of the corporation to acquire the English Group of mines for the benefit of the company. No foundation is found for this assumption in the finding of the court. The finding on page 32 of the record on that subject is in these words:

"That at the time he wrote said letter the said Steinfeld had made up his mind to shut down said mine and smelter for the purpose of acquiring the interest of Nielsen in said corporation, and for the purpose of acquiring a certain adjoining group of mines known as the English claims before proceeding with the further development of the Old Boot Mine, and wrote said letter in pursuance of his said purpose."

"That the said English group of mines adjoined the said Old Boot Mine, and if acquired for the corporation would greatly add to the value of the stock held by the said Nielsen in said corporation, all of which was known to the said Steinfeld; that at the time said Steinfeld wrote the said letter dated January 3, 1900, and at the time of the discharge of the said Nielsen as Superintendent as hereinafter found, and at the time the said Steinfeld acquired the stock held by the said Nielsen as hereinafter found, the said Steinfeld intended and expected that the said corporation would acquire the English group of mines, but did not disclose the said fact to the said Nielsen."

There is absolutely no basis in these findings for the assumption that the corporation as such had any policy with regard to the English claims which was known to or formed by its board of

directors. The only policy shown by these findings rests alone in Steinfeld's intentions, which he did not disclose to Nielsen before buying his stock.

There is no finding of any fact which would even tend to show that Nielsen, by virute of his being a director, had the slightest avenue of information as to Steinfeld's intentions or that the company ever had any intention or policy in regard to the matters which influenced Steinfeld.

The Court again ignores the findings of the trial court, when it states the half-truth that Steinfeld withheld from Nielsen any plan or intent on his part to get rid of Nielsen, either as manager and superintendent or to purchase his stock at the time he closed or caused the closing down of the mine and smelter, for the finding is that he shut down for these purposes and not for the reasons stated in his letter, and that Nielsen did not know it, but believed he had taken that action for legitimate business reasons, as stated in his letter.

The Court then proceeds:

"But the plan or purpose in itself would not constitute fraud, unless it was accompanied by some actual representation or withholding of some fact not within the knowledge of Nielsen, or readily ascertainable by him, which he was entitled to know."

The findings show that Steinfeld's action was accompanied by a deliberate misstatement of the result of the operations, it was followed promptly by the pretended discharge of Nielsen, and the records of the company are falsified to make it appear that Steinfeld had authority for his actions. The court finds that the representation made by Steinfeld in his letter was false and fraudulently false, in that it was made to deceive Nielsen. He withheld from Nielsen the knowledge that he was using the whole machinery of the corporation, not for the benefit of the corporation, but for his own. His action was thus accompanied by a suggestion of falsehood, as well as by a suppression of the truth.

It was never contended by the appellant that the mere fact that Nielsen was in reduced financial condition was in itself, and standing alone, a conclusive evidence of fraud, and what effect that fact would have standing alone, in the absence of

misrepresentation or concealment, is a bootless inquiry in the face of the findings in this case.

The studied attempt of the court to weigh each fact shown in the findings as if it stood alone and was the sole ground relied on for a decision, is a remarkable instance of failure to grasp the questions involved. The question is not, as the court assumes, whether standing alone the facts it discusses would separately show fraud, but taking them together with the found intention to deceive on the part of Steinfeld, and the fact that Nielsen was deceived thereby, and Steinfeld's domination of the situation, do all the facts weighed in the light of the surrounding circumstances show that Steinfeld went into these transactions with a pure heart and came out of them with clean hands? If one of the parties to a transaction is in reduced circumstances and the other rich, if the rich man becomes the purchaser of the poor man's all at an inadequate price, if the sale is the result of misrepresentation by the rich man, made especially to induce the sale to him, if those representations are falsely and fraudulently made, and if the poor man sells believing the representations to be true and acts and relies on such belief, it would seem that the case shown by the findings was complete. It is admitted that mere inadequacy of price standing alone will not authorize a rescission of a contract, unless it be of so gross a nature as to amount in itself to conclusive and decisive evidence of fraud, but where such inadequacy of price is accompanied by actual misrepresentation, when the seller is in the financial power of the buyer, when the seller's distress and necessity are the product of a fraudulent use of power by the buyer, of his power as the dictator and majority stockholder in a corporation in which both are interested are falsified to deceive the seller and he is deceived, the inadequacy of price becomes only one of a mass of incriminating facts and not the sole basis for a rescission.

The following decisions show the rule in regard to inadequacy of consideration when coupled with other inequitable circumstances:

"While inadequacy of consideration itself is not a ground of relief, unless so gross as to shock the conscience, when connected with suspicious circumstances or misrepresentations of mater-

ial facts, it affords a vehement if not conclusive evidence of fraud."

Cofer vs. Moore, 6 Southern (Ala.) 307.

"From the cases here cited we may draw the general conclusion that if the inadequacy of price is so gross as to shock the conscience, or if in addition to gross inadequacy the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property or parties interested in it has been for any other reason misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefiitted by the sale to raise the presumption of fraud."

Graffam vs. Burgess, 117 U. S. 180; 29 Law Ed. 839.

"Though inadequacy of price is not of itself, in general, sufficient to avoid a contract, yet it has been held, that when coupled with weakness of mind from whatever cause produced, or with pecuniary distress, or circumstances of fraud, it affords a proper subject for relief in equity."

Leslie vs. Mahan, 25 Ala. 445.

"When the accompanying incidents are inequitable, and show bad faith, such as concealments, misrepresentations, undue advantage, oppression on the part of the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities and the like on the part of the other, these circumstances combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative. It would not be correct to say that such facts constitute an absolute and necessary ground for equitable interposition. They operate to throw the heavy burden of proof upon the party seeking to enforce the transaction, or claiming the benefits of it, to show that the other acted voluntarily, knowingly, intentionally and deliberately, with full knowledge of the nature and effect of his acts and that his consent was not obtained by any oppression, undue influence or undue advantage taken of his condition, situation or necessities. If the party upon whom the burden rested should succeed in thus showing the perfectly good faith of the transaction, it would be sustained; if he should fail, equity would grant relief affirmative or defensive, as might be appropriate."

2 Pom. Eq. Jr. (3rd Ed.) 928.

The opinion of the Supreme Court of Arizona ignores the finding it purports to hold insufficient. It is based on supposi-

tions which have no foundation in the findings, and is the result of attempting to rest the case of appellant on single facts, forgetful of the other facts shown.

The statement made by the Court in its opinion, quoted in the 8th assignment of errors, that "The Court does not find as a fact that Nielsen did not in fact know that Steinfeld intended and expected that the Silver Bell Copper Company would acquire the English group of mines, but the finding is that Steinfeld did not disclose said fact to Nielsen," is another illustration of the utter failure of the Territorial Supreme Court to grasp and treat the findings of the trial court as a whole, for while the language quoted in this assignment appears to have been based on the finding on page 32 of the transcript of record that, "at the time Steinfeld acquired the stock held by the said Nielsen as hereinafter found, the said Steinfeld intended and expected that the said corporation would acquire the said English group of mines, but did not disclose said fact to the said Nielsen," it entirely overlooks and disregards the finding made by the Trial Court on page 36 of the record "That the said Nielsen at the time he signed the said deeds and executed said contract, and made the said transfer of the stock in the Nielsen Mining and Smelting Company (now called the Silver Bell Copper Company) did not know that the said Steinfield had shut down said mine and smelter for the purpose of getting rid of Nielsen and acquiring his stock, and did not know that said mine and smelter had been shut down while the same was making money in order to enable the said Steinfeld to acquire title to the English group." It would thus appear both that Steinfeld did not disclose to Nielsen the fact that he was going to acquire the English group of mines for the corporation and that Nielsen did not know it and that the presumption in which the Court indulged was not only utterly groundless but was positively and conclusively negatived by the findings.

The Court in its opinion repeatedly refers to Nielsen as the "manager" of the corporation. This is another of its presumptions for which there is not a particle of foundation in the findings of the Trial Court. The findings on pages 29 and 30 of the record are that Nielsen was "superintendent" of the corporation; that as such he "took charge of the property of the corpora-

tion, and, subject to the control of Curtis, who as president of said corporation had general control thereof, and conducted the mining and smelting operations of the company for about one year"; "that after the organizaation of said corporation all of the products of the mine and smelter were turned over to L. Zeckendorf & Co., and all moneys, goods and supplies were obtained from the said firm"; that "during this time Albert Steinfeld was the active and managing partner of L. Zeckendorf & Co., and as such had absolute control over the credit extended by the firm to the Nielsen Mining and Smelting Company", "controlled and voted the stock owned by said firm in said corporation" (500 shares) and controlled the 30 shares of stock in the corporation held by him as trustee for Julia Zeckendorf, and "though neither an officer nor a director of said company he dominated and controlled the same"; that two of the three members constituting the Board of Directors of the corporation, "J. N. Curtis (the President) and R. K. Shelton were employees of the firm of L. Zeckendorf & Co. and under the direction and control of said Steinfeld". Where then is there any room to say that Nielsen was in any true sense "manager" of the corporation? The findings answer "none whatever". The naked truth as disclosed by the findings is that Nielsen instead of being the "manager" of the corporation was in fact nothing more than a mere foreman of the work at the mine and smelter and even in this he was subject in law to the control of Curtis and *in fact* to the control of Steinfeld, and there was absolutely nothing in his position as superintendent, or as minority director, or in his situation with reference to the corporation, to warrant the presumption that he controlled or managed the affairs and policy of the corporation in any large or legitimate sense of the term or that he was in a position where he could by any means whatsoever have found out what purposes Steinfeld had in his mind with reference to the corporation and its destinies.

With reference to the finding on page 37 of the record "that neither Steinfeld nor Curtis made any false representations to Carl S. Nielsen or Mary Nielsen, or either of them, with reference to the amount of the indebtedness of the Nielsen Mining and Smelting Company to L. Zeckendorf & Co." it is important to note that this finding only extends to the "*amount* of the indebt-

edness" and not to the fact that false representations were actually made by Steinfeld about the *fact* of the indebtedness, for the findings set out on pages 31 and 32 of the record the letter of Steinfeld to Nielsen in which Steinfeld tells Nielsen that he has decided to close down both mine and smelter "in view of the very large indebtedness existing against the company, and the fact that little headway is being made towards its liquidation" and follows this letter up with findings of the Court in these words. "That at and prior to the time Steinfeld wrote said letter the said mine and smelter of said company were running at a considerable profit, and the debt due from said company was being substantially reduced, and that these facts were known to Steinfeld at the time he wrote and sent said letter to Nielsen". It would thus appear that the Trial Court did find that Steinfeld knowingly made false representations about the indebtedness of the corporation to L. Zeckendorf & Co. and that the finding referred to on page 37 of the record applies to the "amount" of the indebtedness and to that alone, and not to the fact that he made false representations about the indebtedness.

Before concluding this argument it is important to observe that the decision rendered by the Supreme Court of Arizona in this case was rendered by a bare majority of the five members constituting the whole court, Justices Nave and Sloan concurring in the opinion and decision rendered by Justice Doan, Justice Campbell who heard all of the evidence and decided the case in the District Court of Pima County not sitting, and Chief Justice Kent dissenting and saying: "I dissent from the conclusion and the result reached by my associates in the foregoing opinion. I think the judgment of the Trial Court was correct." (Record, page 68.) In view of all of the facts set out in the findings in this case and of the law as laid down in the authorities above quoted, we think it would have been strange indeed if the Chief Justice had not dissented.

CONCLUSION.

In conclusion counsel for the appellants respectfully submit to the Court that the following propositions are conclusively established:

First. That under the authority of Stringfellow vs. Cain, *supra,* the findings of fact made by the District Court of Pima County will be taken by this Court as the "statement of the case" which the law required the Supreme Court of Arizona to make.

Second. That the findings show conclusively that Steinfeld dominated and controlled the Nielsen Mining and Smelting Company absolutely and held and controlled the majority of its stock, and that under the authority of Miner vs. Belle Isle Ice Co.. Wheeler vs. Alibene National Bank Building Co.. Oliver vs. Oliver, Stewart vs. Harris, and Pomeroy's Equity Jurisprudence, *supra,* and the other cases and authorities above cited in that connection, he was as such dictator and as the holder of a majority of the stock of the corporation a quasi trustee for Nielsen as to the stock held by him and as such trustee was bound to disclose to Nielsen all of the facts within his knowledge affecting the affairs of the company and the value of the stock before purchasing the same.

Third. Third that the findings show conclusively that Steinfeld did not disclose to Nielsen the fact that he shut down the mine and smelter to get rid of Nielsen and get his stock and to acquire the English claims and show that he gave to Nielsen a false reason for shutting down the same, and under the authority of Miner vs. Belle Isle Ice Company, Wheeler vs. Abilene National Bank Building Co., Oliver vs. Oliver, Stewart vs. Harris, and Pomeroy's Equity Jurisprudence, this failure on the part of Steinfeld to disclose these facts rendered the contract for the purchase of Nielsen's stock and the transfer of the stock voidable at the election of Nielsen's administratrix.

Fourth. That the findings show conclusively that the statement made by Steinfeld to Nielsen in his letter of January 3, 1900, to the effect that he was ordering the mine and smelter to be shut down in view of the large indebtedness of the corporation to L. Zeckendorf & Co., and the fact that little headway was

eing made in reducing that indebtedness was false and was ade for the purpose of deceiving Nielsen and that Steinfeld's ue reason for shutting down the mine and smelter was to get d of Nielsen as a stockholder in the corporation and to get his ock and enable him to acquire the English claims, and that he d shut down the mine and smelter when they were making oney and substantially reducing the indebtedness in further- ce of his purpose to get Nielsen's stock and to acquire the nglish group of mines, and that in carrying out this purpose had the books of the corporation deliberately falsified so as show Nielsen's discharge as superintendent of the corporation a time when he had not been discharged; and that at the time hen Steinfeld proposed to purchase Nielsen's stock in the cor- oration Nielsen was in necessitous circumstances and had all his means tied up in the stock and Steinfeld knew it and told m that if he did not accept his offer for the stock he would get thing for it; and that under the authority of Pomeroy's Equity risprudence and the other authorities above cited these acts Steinfeld constitute such fraud and oppression as render e sale and transfer of the stock to Steinfeld voidable at the ction of Nielsen's administratrix.

Fifth. That the findings show that the consideration given r the contract and transfer of the stock was inadequate at the ne of the execution of same and that the sum of $10,000.00 paid Steinfeld to Mrs. Nielsen on the contract after the sale of the rporation's property and after he had collected a dividend of 11.00 per share on the stock was a grossly inadequate price for e stock; and that this fact taken in connection with the cir- mstances of fraud and oppression on the part of Steinfeld, as own by the findings, under the authority of Pomeroy and the ses above cited make a clear case for the rescission of the con- ct and transfer of the stock regardless of whether Steinfeld held to have been a quasi trustee for Nielsen as to the stock not.

Sixth. That the decision and judgment of the Supreme Court Arizona is clearly erroneous and should be reversed.

For these reasons and for other reasons appearing in the re- rd counsel for appellants respectfully submit to this Court at the judgment of the District Court of Pima County is

amply sustained by the findings, and that the judgment of the Supreme Court of Arizona should be reversed and the judgment of the District Court affirmed by this Court, or that the cause be remanded to that Court with instructions to affirm the judgment of the District Court.

Respectfully submitted,

WILLIAM HERRING,

Attorney for Appellants.

SUPREME COURT

OF THE

UNITED STATES

Office Supreme Court, U. S.
FILED.
MAR 8 1912
JAMES H. McKENNEY,
Clerk.

OCTOBER TERM, 1911

Mary Nielsen, Administratrix of the Estate of Carl S. Nielsen, Deceased, and Mary Nielsen in her own personal right,

Appellants,

vs.

Albert Steinfeld and the Nielsen Mining and Smelting Company, now known as and called the Silver Bell Copper Company,

Appellees.

No. 218

Appellants' Reply Brief

WILLIAM HERRING,

Attorney for Appellants.

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Appellants' Reply Brief

Appellants have been furnished with a copy of the brief of appellees and submit the following argument in reply to the contentions there made:

PLEA OF STATUTE OF LIMITATIONS

The contention that the statute of limitations bars the case is a peculiar one. The Court below passed on the plea and found (Record, pages 38 and 39) that it was not sustained by the evidence and expressly found facts which negative the plea. There is nothing in the decision of the Supreme Court which touches on the question of the pleadings, and the appellee has not in any way appealed

from the judgment. The pleadings of the case were settled in the District Court and are not now open to dispute.

The attempt to base the operation of the statute on the alleged defects in the complaint as to the misrepresentations cannot avail to bring the question up for decision, and it would seem to be a useless waste of time to tax the patience of this Court by an argument founded on such a contention.

FRAUD AND FALSE REPRESENTATIONS

It is contended that the shutting down of the mine by Steinfeld with the intent to induce Nielsen by reason of his financial necessities to sell his stock is not such fraud as would render the sale of the stock voidable.

The argument is based on the idea that Steinfeld as a creditor had the right to shut it down at any time, and that his reasons for doing so are immaterial, even if done with fraudulent intent.

The fact that Steinfeld did not act from a desire to protect his rights as a creditor is found by the Court, (Finding VIII, Record, page 33).

That he "did not shut down said mine and smelter because of the very large indebtedness existing against said company, and the fact that little progress was being made towards its liquidation, or because it was running deeper and deeper in debt to said L. Zeckendorf & Co., or because the ore was exhausted, but shut down the same solely and exclusively for the purpose of getting rid of the said Nielsen as a stckholder in said corporation and to acquire his said stock and for the purpose of acquiring the English group of mines."

Whatever then may have been Steinfeld's rights as a creditor the Court has found that he was not exercising his rights as creditor, and while he might have had the right to collect his debt, his position gave him no right as creditor to interfere with the running of the mine and smelter. He could only use legal means to collect his debt, and those means gave him no right to stop the operations of the corporation save by means of some proceedings in a court of law.

His choice to use his power as dictator of the corporation was then deliberately made, and he has sworn that he took this course for his own benefit and not for the corporation. He swears in his answer that he purchased the stock for himself. He is thus put in the position of using the corporate property, and of conducting the corporate business for the sole and exclusive purpose of personal benefit to himself and personal damage to Nielsen.

The corporation as such could have no legal policy to get rid of Nielsen as a stockholder, whatever might be its rights to dispense with him as an officer, and consequently Steinfeld was not in pursuit of any policy of the company in this matter of getting rid of Nielsen.

The case of Grant vs. Attrill, 11 Fed. 469, is cited by appellees to sustain the position thus assumed.

In that case there was a purchase of stock which had been partly paid for, but was subject to assessments and the purchasers threatened to make the assessments until the stock was fully paid for. The allegation is that these assessments were not necessary for the purposes of the corporation, and that, after the purchase of the shares, were not intended to be enforced, but that the threat was made to induce the sale, and that the stock was sold at less than its value on account of these threats.

The case went off on a demurrer to the bill, and the Court, in the quotation made on page 59 of appellees' brief, says among other things:

"The validity and force of this transaction are to be determined by the facts as they then existed, and such *representations and concealments as were then made.* * * * * *The defendant does not appear to have misrepresented or concealed any material fact relative to the corporate property or franchises* (italics ours). What was represented or withheld related to the policy of the management."

In that case there was no use of corporate property to benefit the officer directing the use; there was no action which did not affect the whole stock; there was no doing of any unlawful thing. There was no misrepresentation of the effect of the company's

operation; there was no falsifying of the record. It was in that case a weighing of the risk of the management.

There is only a very meager report of this case, only one page and a half being devoted to it. The allegations of the bill are not stated, but reporter undertakes to state its substance, and the equity seems to have rested on the sole ground that the proposed assessments on the stock were not necessary for corporate purposes, and that the holders of a majority of the stock did not intend to make them if they could buy the minority stockholders out. It is expressly stated in the opinion that it was not alleged in the bill that no assessment in form had been made, but that the purport of the allegations is that one had been made and made regularly. The Court calls attention to the fact that only fifty cents a share having a par value of $100.00 had been paid, and remarks that such a corporation would be "exceedingly hollow." It is also expressly stated in the opinion that "the defendant does not appear to have misrepresented or concealed any material fact relative to the corporate property or franchises." It is also stated that "what was represented or withheld related to the policy of the management. The orator seems to have preferred to sell rather than risk the management promised, and he sold out."

It is not alleged in that case, as in the case at bar, that the property of the corporation was used to create the impression that its business had been a failure and that it was getting deeper and deeper into debt. It is not alleged there that the majority, consisting of all the stockholders save the one whose stock was sought, had agreed to allow one stockholder to run the corporation for his own benefit. It is not alleged that the corporate property was mismanaged or that the money to be raised on the assessment would be devoted to any but legitimate corporate purposes. That was a case of a man who had paid in one-half of one per cent for his stock, and who declined to take the risk of management, in the perfectly legitimate discretion of calling assessments on the stock, and who received for his stock five times what he had

paid in. The case at bar is the case of the man who paid the only only consideration that was paid at all for any of the stock, who furnished the only consideration which moved to the corporation for its issue. His stock was fully paid; it was not subject to assessments. The threat here was that he would get nothing for his stock, backed by an unlawful use of the corporate property and an abuse of the corporate power, and an express misrepresentation as the effect of the corporate business. There is no parallel in the two cases.

There is also another potent fact in this case which was not shown by the case under discussion and that is, in that case there was no question that the purchaser of the stock did not have anything to do with the financial difficulties of the seller, if any existed. Here the financial condition of Nielsen was the direct result of Steinfeld's action, and the purchase was made under circumstances of oppression.

APPELLANTS' RIGHT TO MAINTAIN THIS ACTION

It is next urged that the fraud, if fraud it was in closing down the mine, was a fraud on the corporation as such, and that Nielsen has no right to maintain this suit.

There are two answers to this proposition. First, that the fraud in closing down the mine was only one of the means used to induce the sale of the stock, and that the resultant fraud which fruited in the acquisition of Nielsen's stock is what is complained of here by Nielsen; and second, while the act was a fraud on the company, it was likewise a fraud on Nielsen, and each may separately maintain an action for appropriate relief, if such fraud resulted in harm to them.

First—So far as Nielsen is concerned the act of shutting down the mine was a direct representation that the business of the concern was a failure, and was made to induce the sale of his stock. It was a means used to produce a false impression on his mind as to the value of his stock, and coupled with other means used, it did produce that impression and led to the sale

of the stock, and so far as it affected this result it was a fraud which affected him alone. The effect of this action as a misrepresentation is argued hereafter and will not be further noticed here.

Second—The act was both a fraud on the corporation, and a personal fraud on Nielsen.

While it is undoubtedly true that Steinfeld's action in his abuse of corporate powers would have given any stockholder who was affected by it, in common with all other stockholders, the right to file a stockholders' bill and obtain any advantage which he had obtained which of right belonged to the corporation, it does not follow that it alone could obtain relief. If as a result of his abuse of corporate powers a false impression is produced on Nielsen and he acts on it to his detriment, and a damage is likewise done to the corporate property or franchises by which it sustains loss each may in separate suits obtain the appropriate relief, and neither suit is a bar to the other.

It is undoubtedly true that if Steinfeld, after shutting down the mine and smelter, in order to obtain Nielsen's stock at an unfair price had followed up this action by attempting to sell the property of the corporation for the debts due the firm of which he was a member, a court of equity at the request of any stockholder would have enjoined the sale, but the injury that would have entitled the corporation to relief would have been one which affected all the stockholders alike; in other words, one that inflicted a damage on the corporation as such, but it does not follow because this is so that Steinfeld, having obtained Nielsen's stock under the false impression induced by wrongful use of corporate power, and finding it unnecessary to further pervert his domination to his own ends, is satisfied to stop when he has Nielsen's stock. If by reason of his dominion, the corporation and its other stockholders permit his abuse of corporate power and do not seek to hold him responsible for it, is that a reason that the person injured shall have no redress? The fact that every other stockholder than Nielsen was a par-

ticipant in the fraud on him, and that because of such participation they are thus precluded from complaining of Steinfeld's act, can be no reason to deny to Nielsen, who suffered from the joint action of them all, the return of the property which Steinfeld obtained by their joint fraud.

Steinfeld had no intention to injure the corporation as such, save to the extent necessary to deceive Nielsen; he did not wish to destroy any of the corporate property in which he was jointly interested. He did not wish to destroy the value of Nielsen's stock; he wished to acquire it for himself. He did not wish primarily to injure the corporation; he was a large stockholder in that. His purpose was to acquire Nielsen's interest, knowing that his debt was safe and would be paid with interest. Knowing that any attempt to sell the property to pay the debts under these circumstances would subject him to a stockholder's suit by Nielsen for a breach of duty to the corporation, and be attended with expense at any event, he chose the craftier method of leading Nielsen to the belief that even with the smelter running no progress was being made in the reduction of the debt, and that the final failure of the corporation was inevitable, and having thus mislead him, he purchased his stock for an inadequate consideration, telling him that if he did not take what he offered he would get nothing. He was no bungler, destroying the whole house in order to deprive another person of 30% of it—he chose rather to deceive, to excite the fears and trade upon the necessities of the other, whose condition of financial distress was the result of his fraudulent use of corporate power and trust, and have him part with his interest at a small price. Taking the findings of the Court in regard to the representations as to the amount of the debts of the corporation, most strongly against Nielsen, they are that Steinfeld did not deceive him as to the amount of the indebtedness, and that he could have ascertained that for himself, and that he knew that the mine had ore and the furnace was producing copper in considerable quantities. But as to the crucial fact, the fact that fixed the value of his stock, the result of the activities of the corpora-

tion in the reduction of its debts, the Court has found that Nielsen did not know, and that Steinfeld actually made false representations alike by word and act for the purpose of acquiring Nielsen's stock, and did acquire it for an inadequate consideration within six months. Nielsen may have known the physical facts as to the operation of the plant. He knew he had labored hard for the corporation. He knew he had produced metal, but he is falsely told that the result of these efforts has been that there has been no reduction of the debts, and believing Steinfeld's statement and representations to that effect he sells his stock to him. He was actively misled by Steinfeld, to his hurt, and Steinfeld's acquisition of his stock was the result of such fraud. Neither Steinfeld nor the corporation have shown any right to keep this property.

ALLEGATIONS OF COMPLAINT AND FINDINGS SUFFICIENT

It is next contended by appellees that the complaint is not sufficient to sustain the findings.

It is argued that the only misrepresentation which is both alleged and found is that with respect to the discharge of the Superintendent, and this is dismissed with the curt remark that counsel "deem this inconsequential."

It is here admitted by appellees that there was one representation which was false and made with intent to deceive. It was found that it did deceive and was relied on in the sale of the stock. The effect of this representation was to induce Nielsen to surrender control of the mine and smelter and to compel him to seek employment elsewhere. It put Steinfeld and his subservient directors in the exclusive possession of all of the property of the corporation, and the finding is that Nielsen believed he had been legally discharged and relied on such belief when he sold his stock, and at the time he ceased to operate the smelter. (Record, pages 33, 36.)

The Revised Statutes of Arizona contain the following provision:

> "1293 (sec. 84). The court shall at every stage of the action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

The substantial rights of the appellees are not affected by the fact that the letter of January 3, 1900, is not specifically alleged and the defendants denied in their answer that they made any misrepresentation of any kind to induce the sale to Steinfeld. (Record, page 16, paragraph VI, of Answer, bottom of page.)

The discharge was only *one* of the false representations made, and even the astuteness of counsel has not pointed out any other object for the making of it save the one set out in the findings that it was done to get rid of Nielsen as a stockholder. It had no honest corporate purpose, and the deceit and forgeries used to bolster it up showed how much Steinfeld considered it worth as a means to an end.

But counsel's argument has a fundamental vice in that it assumes that all of Steinfeld's representations had to be made by word of mouth, and, permeated by this error, the argument is adroitly made that the only misrepresentation alleged is that relating specifically to the amount of the indebtedness of the corporation to Zeckendorf & Co. The complaint, on Record page 9, contains this allegation:

"That some time after said corporation was organized, as hereinbefore alleged, said Steinfeld conceived and put into execution the design of forcing said Nielsen out of said corporation and acquiring his three hundred shares of stock for a mere pittance of the real value thereof, and that in order to accomplish said purpose and design, the said Steinfeld shut down said mine and smelter and caused the said Nielsen to be discharged as such superintendent as hereinbefore alleged, and falsely represented to the said Nielsen that the indebtedness of said corporation to the firm of L. Zeckendorf & Co. amounted to from $75,000 to $85,000, and threatened that if said Nielsen did not accept his offer for said shares of stock that he would cut him off without anything for the value thereof."

This is a plain allegation that Steinfeld's act of shutting down the mine and smelter was done in order to accomplish his purpose, the inducing a sale of Nielsen's stock to him for a pittance. Having no right to shut down the mine for that purpose, and intending to deceive Nielsen as to his reasons for doing it, he wanted to lead Nielsen into the belief that it was done for a lawful purpose. If he created the false impression that the corporation was not paying its debts by the operations of the mine and smelter by the act of shutting it down, it is immaterial how he explained his action. His letter of Jany. 3, 1900, (Record, page 31), was but one of the acts intended to deceive Nielsen,

and taken in connection with the proved use of corporate dominion to bolster up this deceit, explains what he intended to convey to Nielsen by the act of closing the mine and smelter. The material thing is: did he by the shutting down of the mine and smelter in connection with his other acts and letters, intend to deceive Nielsen in order to induce the sale of the stock. The deceiving of Nielsen was the thing complained of; the gravamen of the complaint is that by acts and words, by forgeries and oppression, he first separated Nielsen from his position as superintendent and then from his stock as a stockholder. In the language of the Supreme Court, "the gist of the action is fraudulently producing a false impression on the mind of the other party. If this result is accomplished it is not important whether the means of accomplishing it are words *or acts* of the defendant,"

Stewart vs. Wyoming Cattle Co., 128 U. S. 383,

And the act of shutting down being found to have been done for the fraudulent purpose there is abundant allegation of misrepresentations to induce the sale. Counsel pursues the line of argument he so successfully used on the Territorial Supreme Court of endeavoring to argue only one fact at a time, and urging that this one fact, standing alone, is not sufficient to void the sale. The complaint thus alleging both the act and the purpose to deceive by such action, and alleging further that the decit was successful and the sale superinduced thereby; let us see if the findings support these allegations. The findings on page 33 of Record are as follows:

"That at the time said Steinfeld had such mine shut down he was informed of the value of said Old Boot Mine and of the values of said adjoining properties thereto, and did not shut down said mine and smelter because of the very large indebtedness existing against said company and the fact that little progress was being made towards its liquidation or because it was running deeper and deeper into debt to said L. Zeckendorf & Co., or because the ore was exhausted, but shut down the same solely and exclusively for the purpose of getting rid of Nielsen as a stockholder in said corporation and to acquire his said stock,

There is then abundant allegation of misrepresentations by

acts, independent of the representations as to the amount of indebtedness, which is claimed to be the only misrepresentation alleged, and there are the findings, fuller perhaps than the allegations, that in addition to the false impression created by the act of shutting down the mine, that he had also in writing deceived as to the object of this very shut down by making deliberate false statements as to the reasons which moved him when he did it. It matters not if the act was in itself intended to deceive and did deceive, that in addition to this deceit a writing with a like object of deception is not specifically alleged. Having alleged that the act was fraudulently intended to deceive Nielsen, and did deceive him, it was permissible to show the intent with which he did the act by showing a false statement of his motives for it made before the act was done.

There is likewise an allegation in the complaint (Record, pages 4 and 5) in the following words:

"That during the last five or six months the said Nielsen was in charge of said mine and smelter as superintendent thereof, said Steinfeld kept representing to said Nielsen, through said Curtis, that said corporation *was getting deeper and deeper into debt to said firm of* L. Zeckendorf & Co. on account of the moneys, goods and supplies furnished as aforesaid, and about the time said mine and smelter was shut down he represented to said Nielsen, through said Curtis, that said corporation was at the time of said shut down indebted to said firm in the sum of from $75,000 to $85,000."

The Court found, page 37 of Record:

"That neither the said Steinfeld, or the said Curtis, made any false representations to the said Carl S. Nielsen or Mary Nielsen or either of them with reference to the *amount of the indebtedness* (italics ours) of the Nielsen Mining & Smelting Co. to L. Zeckendorf & Co., but said Carl S. Nielsen and Mary Nielsen had at all times the means of ascertaining the amount of the indebtedness of said corporation, and could with reasonable effort have ascertained the same, and in all the transactions herein set forth neither the said Carl S. Nielsen or Mary Nielsen relied on any such representations."

The sole scope of this finding is that as matter of law the Nielsens having the means of finding out the amount of the

indebtedness of the corporation did not rely on any representations as to the *amount*.

The Court does not find that the Nielsens were not deceived by the statement that the company was getting deeper and deeper into debt to Zeckendorf & Co., but on the contrary a study of the following finding will disclose that the Court affirmatively found that Steinfeld did deceive Nielsen as to *the state and the fact* of indebtedness of the corporation.

"That during the months of October, November and December, 1899 and January, 1900, the smelter of the company was in active operation, and was producing copper at a material and considerable profit, and was reducing the debt owed by the company to the firm of L. Zeckendorf & Co." (Record, page 31.)

Then following the letter of January 3, 1900, is the following finding (Page 32 of Record):

"That at and prior to the time the said Steinfeld wrote said letter the said mine and smelter of said company were running at a considerable profit and the debt due from said company to the firm of L. Zeckendorf & Co. was being substantially reduced, and that these facts were known to the said Steinfeld at the time he wrote and sent said letter to Nielsen."

The following findings conclusively show what Steinfeld had in mind when he took the action:

"That at the time said Steinfeld had such mine shut down he was informed of the value of said Old Boot Mine and of the value of said adjoining properties thereto, and did not shut down said mine and smelter because of the very large indebtedness existing against said compaoy and the fact that little progress was being made towards its liquidation, or because it was running deeper and deeper into debt to said L. Zeckendorf & Co., or because the ore was exhausted, but shut down the same solely and exclusively for the purpose of getting rid of Nielsen as a stockholder in said corporation, and to acquire his said stock, and for the purpose of acquiring the English group of mines."

Record, page 33.

These pleadings allege a false representation, "that the corporation was getting deeper and deeper into debt to the firm of L. Zeckendorf & Co.," and the findings show that in slightly different language Steinfeld's representation is made that the

corporation was largely in debt to that firm, and the false statement that little progress was being made in its liquidation is given as an excuse for closing down its operations. It is shown by the findings that this letter was false, known to be false when written, and was written not for the business reasons falsely stated, but for the sole and exclusive purpose of getting rid of Nielsen as a stockholder and the acquirement of his stock by Steinfeld as an individual. It is further shown by the findings that Steinfeld knew his contract was not a fair equivalent for the stock when he received it; that Nielsen was in financial distress, and that in the sale he believed and relied on Steinfeld's statement of the reason for shutting down the mine and smelter.

On this point the Court also found (Record, page 36):

"That the said Nielsen at the time he signed said deeds and executed said contract and made the said transfer of the stock in the Nielsen Mining & Smelting Company, did not know that said Steinfeld had shut down said mine and smelter for the purpose of getting rid of said Nielsen and acquiring his said stock, and did not know that the said mine and smelter had been shut down while the same was making money in order to enable the said Steinfeld to acquire the English group, and did not know that the said Steinfeld has no authority from the Board of Directors to discharge the said Nielsen, or that the record in the minute book of the company showing his discharge by said Board of Directors on or about the 1st day of February, 1900, was false and that no such meeting of the Board of Directors was ever in fact held, but the said Nielsen believed he had been legally and duly discharged and that the said Steinfeld had shut down said mine and smelter for the reasons stated in his letter of January 3, 1900, and acted and relied on such belief."

It would thus appear conclusively from the allegations of the complaint and from the findings made by the Court that Steinfeld did make false representations to Nielsen about the fact of the indebtedness and that Nielsen acted and relied upon those false representations and was misled thereby to his hurt. The fact that the Court found that Steinfeld made no false representations about the "amount" of the indebtedness is immaterial in the face of the fact that the Court did find that Steinfeld did

make false representations about the existence and character of the indebtedness—that it was very large and that little headway was being made towards its liquidation—and that he made these representations, knowing them to be false, for the purpose of deceiving Nielsen and getting his stock—and that Nielsen acted and relied on these representations believing them to be true.

FINANCIAL DISTRESS OF NIELSEN

The following allegations are material to be considered:

"That knowing that all his means were tied up in said corporation, and that he was without means to pay any part of said indebtedness, and believing himself to be at the mercy of said Steinfeld, and fearing from said threats made by said Steinfeld that he would get nothing for his said shares of stock if he refused to accept Steinfeld's offer, he, the said Nielsen, and his wife, the said Mary Nielsen, were by said representations and threats driven, defrauded and coerced into signing their names, etc."

Record, page 5.

The finding is:

"That the said Nielsen was in financial distress and was without means to resist the will and the directions of said Steinfeld, and the said Steinfeld knew the pecuniary condition of the said Nielsen" (Record, page 36); and the further finding: "That at the time the said Steinfeld was negotiating with the said Nielsen (for the purchase of said stock) the said Nielsen was in financial distress, and was without means, and the fact was known to said Steinfeld at the time."

Record, page 34.

THREATS BY STEINFELD

The complaint shows the following allegations:

"Thereupon said Steinfeld threatened that if said Nielsen did not accept said terms he would cut him off without one cent for his shares of stock."

Record, page 5.

The finding is:

"That during the negotiations (for the purchase of the stock)

the said Steinfeld stated to the said Nielsen that if he did not take the offer of the said Steinfeld he would get nothing for his said stock."

Record, page 34.

INADEQUACY OF PRICE

The allegation is that:

and for the purpose of acquiring the English group of mines."

"Sometime after said corporation was organized, as hereinbefore alleged, said Steinfeld conceived and put into execution the design of forcing the said Nielsen out of the said corporation and acquiring his three hundred shares of stock for a mere pittance of the real value thereof," etc.

Record, page 9.

The finding is:

"That the contract for the payment of the sum of ten thousand dollars, at the times and under the provisions provided in said contract, was not an adequate consideration for the three hundred shares of stock, and that the said Steinfeld knew at the time he obtained the execution of said contract and the transfer of the said stock that the said contract was not a fair consideration for said stock, and that at the time the said Steinfeld paid the said sum of ten thousand dollars to the said Mary Nielsen, the said sum was not a fair value of said stock, but the same was a grossly inadequate price for the said stock, all of which the said Steinfeld knew."

Record, page 38.

SALE AND TRANSFER OF STOCK VOIDABLE

It is next insisted by appellees that even if the shutting down of the mine was fraudulent, the fraud did not render the sale of the stock voidable.

This position rests solely on the contention that an act cannot be both a corporate and an individual wrong. If this contention be untenable then the whole argument falls to the ground. Let us examine this position; if the only injury is one that a single shareholder suffers in common with every other shareholder, then the injury is corporate, and the corporation is the proper party to sue, and the relief belongs to the cor-

poration. That was the state of facts in the case of Smith vs. Hurd, 12 Met. 371, which is cited and relied on. The reckless and improvident management affected all the stockholders alike, and the assets lost and wasted belonged to the corporation, and that being the case, the corporation should have brought the suit.

For the injury to the corporate property which results from corporate mismanagement the stockholder may not be able to sue in his own name so long as he suffers no injury from such action which is not distinct from the injury which all the stockholders alike suffer, or the other stockholders do not obtain an advantage which is denied to him.

It is difficult to see if the shutting down was fraudulent, and the only man injured by the fraud was Nielsen that he is without remedy. Let us apply the test. The corporation dominated by Steinfeld determines that as a corporate policy it should acquire the stock of Nielsen for the benefit of all the other stockholders of the corporation. In due legal form it resolves to cease operating its plant that the object may be affected. A letter is sent to the objectionable stockholder that the shut down was for business reasons, and then in compliance with the design to acquire his stock the obnoxious stockholder is discharged from the employment for the purpose of compelling him by reason of his necessities to sell, and then his stock is bought by the company at a price which is not its fair value.

Would it be an answer to this state of facts to say that the sole stockholder who was thus injured must sue in the name of the corporation?

In principle, what is the difference between this supposed case and the case at bar? The corporation has the legal right to cease operations in its discretion, so far as its business is concerned, and all stockholders are alike affected by such action. But when the other stockholders of the corporation, who are also the president and the owners of all the stock except that desired to be purchased, use privileges which belong to the corporation for the benefit of all stockholders alike for the bene-

fit of some of the stockholders, the case is just as if the corporation in due legal form had done these things. The following quotation from the case of

Ervin vs. Oregon Ry. & Nav. Co., 27 Fed. 630,

fits the case here.

"Plainly the defendants have assumed to exercise a power belonging to the majority, in order to secure personal profit to themselves without regard to the rights of the minority. They repudiate the suggestion of fraud, and plant themselves upon their right as a majority to control the corporate interests according to their discretion. They err if they suppose that a court of equity will tolerate a discretion which does not consult the interests of the minority."

In that case a dissolution of the corporation provided for by the charter and a valuation of the property which was not shown to be unfair, was set aside and the property followed by a lien in favor of the minority stockholders.

The acts of Villard, who dominated the corporation, are thus commented on:

"The acts of Villard, although he was a director of the old company at the time of the sale, are not discriminated from the acts of the majority of the stockholders, of which he was the representative. The circumstances that his position was more technically that of a trustee towards the minority stockholders than was that of the new corporation, as the majority of stockholders, does not essentially alter or affect the rights of the parties. All that he did was sanctioned by the majority. * * * Villard is a proper party to the suit as one of the actors in the transaction by which the complainants have suffered. *He cannot escape liability* merely because his conduct has been sanctioned by a majority of stockholders."

In that case the wrong done was done as in this case by the use of corporate machinery and the abuse of corporate powers. It was done at the dictation of Villard, who absolutely dominated the corporation, as Steinfeld does in this case. The only difference was that Villard did keep faith with some of the stockholders and gave the new corporation the benefit of the dissolution; Steinfeld claims the benefit for himself alone and denies to the corporation the right to benefit in any way by his

action, and litigates with them to retain the advantage which came to him from the unauthorized use of their property.

Claiming, as he does in this case, the sole benefit of the sale induced by fraud, and the corporation, which is made a party defendant, asserting no claim to the stock, he cannot say that the suit must be brought for the benefit of a party which he declares obtained no benefit from his actions, and is not entitled to the fruits of his bargain. The same reasoning which allows the minority stockholders, when there is more than one, to bring a suit for the benefit of himself and all others in similar circumstances will allow a stockholder who is alone defrauded by the acts of the others to bring a suit in his own name, as he is the only stockholder in like condition.

The rule which allows two or more stockholders to sue and make the corporation a defendant where it appears from the allegations that the corporation was dominated by the wrong doers, and an appeal to the corporate authorities would be useless without making a formal demand, rests on the substantial foundation that a court of equity looks to the substance of things and not to its form, and that where it appears that the interest of all parties in the subject of litigation can be adjusted by the court it will not halt for the failure to add as parties all who might through the corporation claim some interest. There is no doubt on the findings and on the pleadings in this case that the corporation, if it have any rights, is before the Court, and the relief can be moulded to fit the proof. If the sale is the result of fraudulent representations and acts, no matter whether done by the corporation or by Steinfeld by virtue of his control and dominance, then neither the corporation or Steinfeld can hold the stock. The parties to the contract of sale are before the Court, and it can do complete justice.

STATEMENT OF THE CASE

The last contention of appellees is that there is no such state-

ment of facts in the nature of a special verdict as will enable the Supreme Court to review the judgment of the Territorial Supreme Court.

This contention is founded on the idea that by virtue of the certificate of the Chief Justice, made on Nov. 12, 1909, the Supreme Court of the Territory repudiated the finding of the lower Court and that there is nothing here for this Court to decide, or to put it in the words of appelles' brief:

"It is thus conclusively shown that the Court did not adopt or approve the findings of the Trial Court, but expressly declined to adopt or approve them."

The cases cited as authorities for this position are:

Gray vs. Howe, 108 U. S. 12;

Armijo vs. Armijo, 181 U. S. 558.

The first case was an action to quiet title to real property between conflicting claimants of ownership. The District Court heard the cause and found the facts and stated its conclusions of law. There was a motion for a new trial and an appeal both from the judgment and the order refusing a new trial. The Supreme Court heard the cause, reversed the judgment of the District Court, and on the evidence ordered a judgment in favor of the defeated party in the District Court. This Court in considering the case say: "The Supreme Court (of Utah) made no statement of the facts of the case in the nature of a special verdict, and as that Court *must have set aside the findings* in order *to render the judgment it gave,* there is nothing here that we can re-examine. * * * *

"In Stringfellow vs. Cain, 99 U. S. 610, it was held, if the findings of the District Court were sustained, and a general judgment of affirmance rendered in the Supreme Court, the findings of the District Court thus approved by the Supreme Court would furnish a sufficient statement of facts for the purposes of appeal to this Court. *So, too, if there be a reversal and another judgment rendered on the facts as found.* But here the only exceptions to the findings below were that they were contrary to the evidence, and a judgment has been rendered by the Supreme Court *in every way inconsistent with these findings.* The necessary inference, therefore, is that the findings sent up to that Court were set aside and the case disposed of on the evidence."

In the case at bar the Supreme Court of the Territory of Arizona, after stating in full the findings of the District Court, thus state the contention of the appellants there (appellees here):

"It is contended by the appellants that the facts found do not constitute legal fraud, and that therefore the Court erred in so finding and in rendering judgment for the plaintiff and against the defendants based thereon."

This is the Court's own statement of the contention made and the question it was deciding. Its conclusions, stated in its opinion, are in these words:

"In our judgment the findings do not support the legal conclusion made by the Trial Court that such fraud was perpetrated by Steinfeld in the purchase of the stock as to warrant the recission of the contract and the recovery of the stock and of the dividends which have been received by Steinfeld thereon."

"For this reason the judgment of the Trial Court must be reversed and the cause remanded, with directions to the Trial Court to enter judgment for the defendants."

Both in the statement of what it was called to pass on and in the reasons which it gives for its decisions the Supreme Court of the Territory acted on the findings as true, and it rendered no judgment which was in any way inconsistent with them. The case cited is therefore not authority for the position taken.

The facts in the case of Armijo vs. Armijo, 181 U. S. 558, the other case relied on by appellee, were as follows:

The case went off in the Supreme Court of the Territory on a motion to dismiss the appeal there because no motion for a new trial had been made in the Court below, which was granted and the appeal dismissed for that reason.

On appeal to the Supreme Court of the United States application was made to the Territorial Supreme Court to find the facts in accordance with the Act of Congress, and the application was denied, and it was certified to the Supreme Court:

"That for the reasons disclosed by the judgment that Court was unable to find the facts, the appeal not having been perfected in such a manner as to bring them before that Court, and this denial was certified by the Chief Justice."

This Court then uses this language:

"The Supreme Court decided that in order to bring before it the facts in a case tried before a court or referee it was neces-

sary that a motion for a new trial should be made in the Court below, and if such motion was not made the facts in the case were not brought before the Appellate Court on the writ of error or appeal.

"This matter of practice in the Courts of the Territory is based on local statutes and proceedure, and we are not disposed to review the decision of the Supreme Court in such case. * * * The refusal of the Supreme Court to make findings is justified by its certificate that the facts were not before it."

There is in the case at bar no certificate that the facts were not before the Supreme Court of Arizona, and the opinion of that Court shows that the facts were before the Court, and that it accepted and acted on the findings as made by the Trial Court.

The case cited is, therefore, not an authority for the position contended for.

It would, therefore, seem that the rule declared in Stringfellow vs. Cain, *supra,* was conclusive of the sufficiency of the record to support the appeal here.

The rule there declared is that if the findings of the Court below are either approved by a judgment of affirmance, or accepted as correct and made the basis of a different judgment the findings of the Court below will be taken as a sufficient statement of the facts. There is reason in the rule, for it would be a useless thing to repeat the findings if the judgment of the Territorial Court were founded on them. It is only necessary when the Court finds that the findings are not sustained by the evidence, or renders a judgment which shows that such findings are in necessary conflict therewith, that it is necessary to make new findings in order that the Supreme Court of the United States may review them.

This Court has in a case almost the exact parallel of the case at bar passed on the question here raised.

Bierce vs. Hutchins, 205 U. S. 832.

In that case the facts are thus stated:

"The facts were found by the Trial Court, and certain conclusions of law were stated, which the Supreme Court of the Territory held to be wrong. It sustained the exception upon

one point which went to root of plaintiffs' cause of action, and upon the plaintiffs motion, coupled with a statement that it would have no further evidence to present at a second trial, ordered a judgment for the defendant."

Continuing this Court says:

"The findings of fact were taken to be true by the Supreme Court, and they are not open to dispute, except so far as they depend upon rulings of law, so that the questions for decisions here are definite and plain, and there is no need to send the case back for a statement of facts by the Supreme Court, although one should have been made."

The Territorial Supreme Court gave its reasons for not making a statement of facts, and those reasons show not only that it did not decline to approve or adopt the findings of the Lower Court, but on the contrary they show that the reason why the Territorial Supreme Court did not make findings was because for the purposes of the decision which it did render, it had adopted the findings of the District Court. There is not one word in the certificate which shows that they did not adopt those findings. The judgment that they did render and the opinion in which they stated their reasons for the judgment alike show that the findings were taken as true.

The course of judicial proceedure is to first ascertain the facts, and then on these facts to declare the law, and when in the Territorial Supreme Court, the appellants there(appellees here) contended in that Court "that the facts found do not constitute legal fraud, and that therefore the Court erred in so finding and in rendering judgment for the plaintiff and against the defendants based thereon," they in the most binding way admitted the truth of those findings. They sought and obtained a judgment founded on the truth of them, a judgment which the Court could render only on the idea they were true. Their judgment of reversal and remandment is in the express language of the Court's opinion because "in our judgment the findings do not support the legal conclusion made by the Trial Court," and in conclusion that Court states "*for this reason* the judgment of the Trial Court must be reversed."

It does this after fully incorporating the findings in its opin-

ion, (Record, pages 51 to 64), as the facts on which it acted, and it is a novel construction that because the Court states the action which it took and states that for these reasons it does not make a statement of the facts in its certificate, that it thereby intended to repudiate the facts on which it had before acted. The contention in the Supreme Court that the facts found did not support the judgment of the District Court is in legal effect a demurrer to the evidence, and admits the truth of the findings.

By referring to the opinion of the Territorial Supreme Court, set out in the Record, pages 51 to 68 inclusive, it will be seen that the Court begins it opinion by saying: "The Court found the facts as follows"; then sets out the findings made by the Trial Court *verbatim et litteratim;* then says: "Doan, J., (after stating the facts)"; and then winds up its opinion with the remark that: "In our judgment the findings do not support the legal conclusion made by the Trial Court that such fraud was perpetrated by Steinfeld in the purchase of the stock as to warrant the rescission of the contract and the recovery of the stock and of the dividends which have been received by Steinfeld thereon. For this reason the judgment of the Trial Court must be reversed and the case remanded with directions to the Trial Court to enter judgment for the defendants." In the face of these facts how can it be said in logic or in law that the Court did not in legal effect pass on the sufficiency of the evidence to sustain the findings made by the Trial Court or that it did not adopt the findings made by that Court as its own findings in the case? Counsel for appellants insist that to hold otherwise would be to sustain and hold a legal absurdity.

If the appellee feared the possible injustice, as he terms it, of this Court disagreeing with the Supreme Court of the Territory on the legal effect of the findings, he could have protected himself by obtaining a judgment that the evidence did not support the findings.

Choosing to ask a final dismissal of the plaintiff's cause of action on the ground that admitting the findings to be true

they were insufficient in law, he cannot complain if judgment be meted out to him on the idea that they are true.

There is another view to be taken of the action of the Supreme Court of the Territory in making the certificate as to the facts, filed on May 1st, 1909, and its subsequent modification by the certificate dated on Nov. 12. The statements of what the Court decided are identical and the only difference is, that in one they set out the facts again, and in the other it is stated that by reason of what it decided it does not make a statement of the facts.

Its action in no wise repudiates the findings, or intimates that it had in any way modified its action, and there is absolutely no modification of the decree rendered, and there is no judgment rendered in conflict in any manner with the original judgment.

The position of the appellees is that it must have two bites at its cherry in the Supreme Court of Arizona, and that it may speculate on this Court's taking the position that the findings of the Court below did authorize its judgment, and if it should do so that the opportunity may be afforded him to litigate anew on the evidence. With one breath he asserts that the Supreme Court of Arizona was right in remanding the cause, with instructions to enter judgment for the defendant, and that no opportunity be allowed the appellant here to produce other evidence of fraud or misconduct, while with the other he asks that he may be allowed to again litigate his facts if a decision adverse to him is reached.

The Supreme Court of the Territory had no right to render the judgment that it did, except on the ground that the findings were true, and appellee having accepted the fruits of that judgment must be held to have presented his full case to the Supreme Court of Arizona, and received the judgment which the whole case compelled.

Why on his appeal to this Court should he not have his right finally determined when that was the course he induced the Territorial Court to take on his appeal there?

There is abundant authority that this Court in appeals like the present one will only pass on the question whether the find-

ings of facts sustain the judgment appealed from, and it being shown that the judgment of the Supreme Court was based on the findings of the District Court, and not on any consideration of the evidence, this Court will not consider any other question.

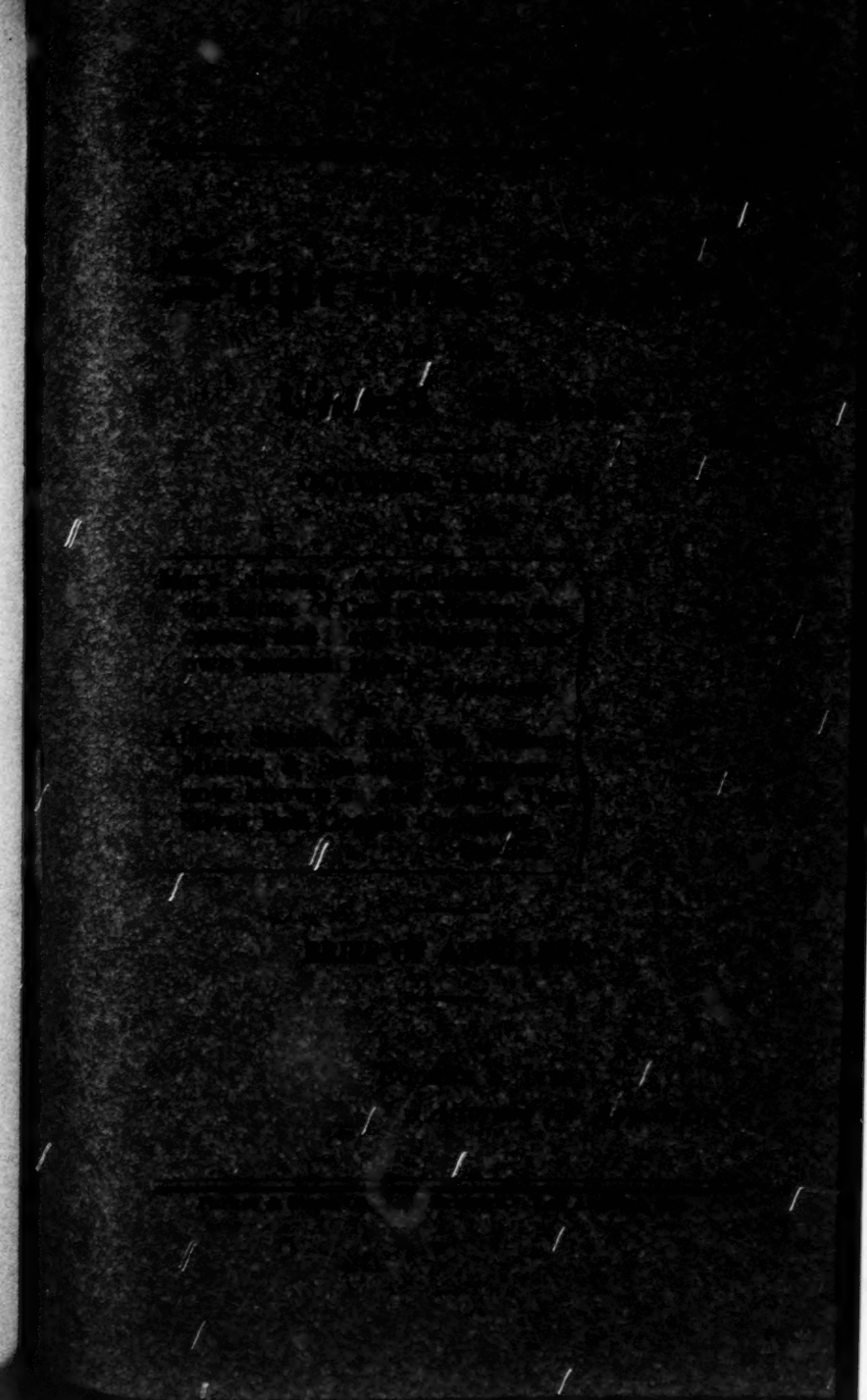
As in the case of Bierce vs. Hutchins, *supra,* the facts in this case were found by the Trial Court, and certain conclusions of law were stated, which the Supreme Court of the Territory held to be wrong. The findings of fact were taken to be true by the Supreme Court, and are not open to dispute except so far as they depend on rulings of law. So that the question for decision here is definite and plain, and there is no need to send the case back for a statement of facts by the Supreme Court.

Such being the situation of the case, counsel for appellants respectfully submit that the findings of fact made by the Trial Court should be taken by this Court as the "statement of the case," which the law required the Territorial Supreme Court to make, and that on those findings the decision and judgment of the Supreme Court of the Territory should be reversed, and that of the District Court of Pima County affirmed, and respectfully ask that all other orders necessary and proper in the premises be made.

Respectfully submitted,

WILLIAM HERRING,

Attorney for Appellants.



IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1911.

No. 218

Mary Nielsen, Administratrix of the Estate of Carl S. Nielsen, deceased, and Mary Nielsen in her own personal right,
Appellants,

vs.

Albert Steinfeld and the Nielsen Mining & Smelting Company, now known as and called The Silver Bell Copper Company,
Appellees.

BRIEF OF APPELLEES.

This suit was brought by Mary Nielsen individually, and as administratrix of the estate of Carl S. Nielsen, deceased, against Albert Steinfeld and the Silver Bell Copper Company, a corporation.

Among other things the complaint prays that a certain sale made by Carl S. Nielsen and Mary Nielsen of 300 shares of the stock of the defendant corporation to Albert Steinfeld or the said

corporation, should be set aside as fraudulent, and that the plaintiff have judgment for said stock and against the said Steinfeld for $33,000 dividend paid thereon and received by Steinfeld.

The contract providing for the sale of the stock was in writing and is set forth in full in the findings at page 34 of the transcript.

In pursuance of this contract a bill of sale of the stock was made by the Nielsens to Steinfeld.

The certificate for the stock was thereafter issued in the name of Steinfeld, trustee, Steinfeld claiming to be the beneficial owner thereof.

Judgment was rendered by the district court decreeing the plaintiff to be the owner of the stock and that she recover of Steinfeld the amount of the dividend less the amount of the purchase price paid by Steinfeld.

From such judgment an appeal was taken to the Supreme Court of Arizona.

The judgment of the district court was reversed and judgment absolute ordered in favor of the defendants. From such judgment the plaintiffs have appealed to this court.

On the first of May, 1909, the Chief Justice undertook to make a certain certificate in lieu of a statement of facts in the nature of a special verdict, and the same was filed.

On the 12th of November, 1909, an order of the Supreme Court was entered withdrawing such statement of facts, and ordering the certifi-

cate of the Chief Justice to be filed in lieu thereof. [Folio 202.] Such certificate was on said date filed, and is as follows:

"I, Edward Kent, Chief Justice of the Supreme Court of the territory of Arizona, do hereby certify that the Supreme Court of the territory of Arizona, having adjudged that the facts as found by the district court in this cause did not sustain the conclusions of law or the judgment of the district court, did, without passing in this court upón the correctness of the facts as found by the district court, remand this cause to the district court with directions to that court to enter judgment absolute for the defendants, and therefore do not certify to the United States Supreme Court any statement of facts in the nature of a special verdict.

Dated this 12th day of November, 1909.

EDWARD KENT,
Chief Justice."

STATEMENT OF FACTS.

In the year 1897, one Julia Zeckendorf was the beneficial owner of a certain mine in Pima county, Arizona, known as the Old Boot mine; the legal title stood in the name of Steinfeld, one of the appellees.

Toward the end of the year 1897, Steinfeld, as trustee for Julia Zeckendorf, made an oral lease of the Old Boot mine to Carl S. Nielsen, the appellant's intestate. The lease was terminable at will. Nielsen had the privilege of working the mine and extracting, shipping and selling ores therefrom, and paid a royalty of $1.25 per ton on all ore shipped or smelted by him. He op-

erated the mine under this lease until about the 14th of January, 1899, at which time he was indebted to the firm of L. Zeckendorf & Co. in the sum of $17,434.52; to employes in the sum of $1221.12, and to other merchants in various sums; his total indebtedness aggregating $22,886.86.

Nielsen's assets consisted of certain tools and property at the mine and of some matte in transit to market.

In pursuance of an agreement between L. Zeckendorff & Co., Nielsen and one Curtis, a mining man, representing L. Zeckendorf & Co., the appellee corporation was organized. Its capital stock was $25,000. Nielsen's lease and other assets were transferred to the corporation, which assumed his liabilities; 499 shares of the stock were issued to L. Zeckendorf & Co. and 1 share to R. K. Shelton, an employe of L. Zeckendorf & Co., 170 shares were issued to Curtis, 30 shares to Steinfeld as trustee for Julia Zeckendorf, and the remaining 300 shares, the subject-matter of this action, to Nielsen.

The incorporators and directors were Curtis, Shelton and Nielsen. Curtis was elected president and treasurer, Shelton secretary, and Nielsen vice-president.

At the first meeting of the board of directors held on the 14th of January, 1899, "on motion it was unanimously agreed that Carl S. Nielsen be

elected superintendent and act as such for a period of one year, and Mr. Nielsen accepted the position." [Folio 68.]

It is alleged in the complaint that it was agreed that Nielsen should be the superintendent of the corporation. There is no finding to such effect.

Shortly after the organization of the corporation it took an option upon the mine for $25,000, to be paid in installments of $2500 every ninety days. Immediately upon his election as superintendent Nielsen took charge of the property of the corporation and subject to the control of Curtis conducted the mining and smelting operations of the company for about one year. The product of all ore smelted was shipped to market through the firm of L. Zeckendorf & Co., which received the proceeds, and all moneys, goods and supplies were obtained from such firm. Steinfeld, as the managing partner of L. Zeckendorf & Co., had absolute control over the credit extended by said firm to the corporation [folio 70], and had the power to determine whether at any time further credit should be extended to the corporation, and had the power and legal right at any time to cease extending credit to the corporation. The firm of L. Zeckendorf & Co. was under no obligation at any time to extend further credit to the corporation and had the legal right at any time to cease giving such credit and to enforce the collection of the amount owing to it by the corporation. [Folio 72.]

Steinfeld was at no time until 1901 a director or officer of the corporation, but it is alleged and found that he dominated it. The finding is that the power of Steinfeld over the corporation arose out of the fact that it was largely indebted to L. Zeckendorf & Co., and that L. Zeckendorf & Co. and Steinfeld, as trustee for Julia Zeckendorf, held a majority of its stock.

It is alleged in the complaint that the indebtedness of the corporation to L. Zeckendorf & Co. on or about the first of January, 1900, was about $30,000. [Folio 25.]

It is alleged in the answer that such indebtedness amounted to between $75,000 and $85,000. [Folio 39.]

There appears to be no finding on the subject other than that the corporation was largely indebted to the firm. [Folio 71.]

In addition to the indebtedness to L. Zeckendorf & Co. there was due at such time upon the optional purchase price the sum of $15,000. [Folio 73.]

The gist of the complaint consists of the allegation many times repeated that Steinfeld and Curtis, his representative, falsely represented to Neilsen that the indebtedness of the corporation amounted to from $75,000 to $85,000. These allegations were affirmatively found to be untrue [folios 85-6]; and it was furthermore found that Neilsen and his wife had at all times the means

of ascertaining the amount of the indebtedness [folio 86].

On the 3d of January, 1900, Steinfeld wrote Nielsen a letter, as follows:

"In view of the very large indebtedness existing against the company and the fact that little headway is being made towards its liquidation, I have decided after careful consideration to close down both mine and smelter when the present coke supply is exhausted, which would be about the 15th or 20th inst. You will please make all provision to this end, incurring no larger outlay than is absolutely necessary for such articles as wood, ore and other supplies, except what would be required for the purposes stated. The present good showing of the mine may place us in a position to sell the property at an advantageous price, and this will be my aim to do at the very earliest possible moment."

About the first of February, 1900, Steinfeld undertook to discharge Nielsen from his position as superintendent, and Nielsen refused to be discharged. Subsequently Curtis and Shelton, for the purpose of making it appear from the records of the corporation that Steinfeld had authority to discharge Nielsen, caused to be entered upon the corporate minutes as of date February 1st, 1900, a resolution, as follows:

"On motion duly seconded, it was resolved that C. S. Nielsen be, and he hereby is, discharged as superintendent of this corporation, and his salary as such be discontinued from this date."

On the 10th of March, 1900, the directors of the corporation, at a meeting of which Nielsen

had notice, duly passed a resolution discharging him.

On the 19th of February, 1900, the supply of coke and ore was exhausted, and Nielsen shut down the mine. When the smelter was shut down in February, 1900, substantially all of the ore which had been developed prior thereto was exhausted, but it is found

"If the development work had not been stopped by the said Steinfeld but had been continued during the operation of the said smelter, sufficient ore would have been developed to have kept the smelter continuously supplied. That the said Nielsen at the time of the closing down of the smelter knew the condition of the mine." [Folio 78.]

Shortly prior to June 29, 1900, negotiations were opened between Nielsen and Seinfeld which resulted in the contract in question.

It is alleged in the complaint that during such negotiations Steinfeld threatened Nielsen that if he did not accept his offer for his stock he would cut him off without anything. [Folio 14.]

The finding of the court is:

"That during the negotiations the said Steinfeld stated to the said Nielsen that if he did not take the offer of the said Steinfeld he would get nothing for the said stock." [Folio 79.]

It is also found that

"During the months of October, November and December, 1899, and January, 1900, the smelter of the company was in active operation and was

producing copper at a material and considerable profit, and the sale of the product of the said smelter was materially reducing the debt owing by the said company to the firm of L. Zeckendorf & Co. The exact amount of profit during the time is not shown by the evidence." [Folio 73.]

It is alleged in the complaint that Seinfeld's true purpose in shutting down the mine was to acquire the Nielsen stock at a mere pittance of its actual value [folio 24], and some neighboring mining claims called the English group of mines [folio 26], and it is so found by the court.

It is furthermore found

"That the said Neilsen at the time of the closing down of the smelter knew the condition of the mine." [Folio 78.]

THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

By chapter 16 of the Laws of Arizona of 1903 it is enacted as follows:

> "Section 1. There shall be commenced and prosecuted within one year after the cause of action shall have accrued, and not afterward, all actions of suits in court of the following description: * * *
>
> "5. An action for relief on the ground of fraud or mistake. The cause of action in such case not to have been deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

It is pleaded in the answer that prior to the commencement of the action, more than one year

had passed since the knowledge by the plaintiff of the alleged fraudulent acts of the defendant, and that prior to the commencement of the action more than four years had elapsed since such alleged acts, and since the execution and delivery of the agreement of June 29th. [Folios 33 and 34.] If it be deemed that the word "plaintiff" does not include plaintiff's intestate, then the plea that more than four years had elapsed suffices, it being settled that the statute is sufficiently pleaded if the lapse of a great number of years is alleged than will constitute a statutory bar.

13 Ency. Pl. and Pr., p. 220;
Phelps v. Elliot, 35 Fed. 455.

The only allegation in either the complaint or reply with respect to Nielsen's lack of knowledge of the alleged frauds is as follows:

"That the said Carl S. Nielsen died without ever having learned of the falsity of the said representations of the said Steinfeld as to the amount of indebtedness of the said corporation to the said firm and as to said Nielsen having been removed as such superintendent by order of the board of directors of the said company." [Folio 29.]

In order to avoid the defense of the statute it was essential that the plaintiff should affirmatively allege and prove that Nielsen did not discover the fraud complained of during his lifetime.

Meineke v. Edmundson, 33 Tex. Civ. App. 505, 77 S. W. 238;
Newdegate v. Early's Admr., 20 Ky. Law Reporter 1452, 49 S. W. 338.

As appears by the statement of facts the court found that there was no false representation as to the amount of the indebtedness.

The allegation and finding that Steinfeld caused Nielsen to believe that he had been legally discharged when he had not been, does not seem to us to have any force whatever.

In the first place, Nielsen's appointment as superintendent was for one year from the 14th of January, 1899, and therefore his superintendency expired by limitation prior to the first of February, 1900, and it is difficult to conceive how he believed himself to have been legally discharged by action of the directors held on that day. Finally he was legally discharged on the 10th of March, three and one-half months prior to the sale of the stock; so that the most that can be predicated upon this alleged illegal action is the fact that he closed the mine down on the 19th of February, believing himself to have been discharged on the first, rather than on the 10th of March, on which date, as a matter of fact, he was legally discharged. This seems to us trivial.

It follows, therefore, that the findings of the court at folios 83, 84, 85 and 89 to the effect that Nielsen when he signed the deeds had no knowledge of Steinfeld's purpose in shutting down the mine are findings not supported by any allegation in either of plaintiff's pleadings, and that such alleged frauds are clearly barred by the statute of limitations.

We deem it proper to suggest here that the gist of plaintiff's cause of action was the alleged false representations that the indebtedness of the corporation to L. Zeckendorf & Co. was from $75,000 to $85,000, which were found by the court not to have been made. To these alleged false representations the plaintiff recurs again and again in both complaint and reply. They were the only alleged false representations which the pleadings called upon the defendant to combat, and as will hereafter appear the findings by the district court of other alleged misrepresentations upon which it based its judgment were altogether irresponsive to the pleadings.

ARGUMENT.

The complaint discloses three grounds for the setting aside of the contract:

1. False representations alleged to have been made by Steinfeld.

2. A failure to disclose material facts.

3. The fact of the shutting down of the mine.

These will be considered seriatim.

I.

False Representations.

The Supreme Court of Arizona passed upon the appeal as if defendants were appealing from a judgment overruling a demurrer to a complaint, which consisted of the findings of the dis-

trict court, and held in its opinion that such findings did not state a cause of action.

We believe and will presently argue that its judgment is sound, but will first respectfully submit that the findings are not responsive to the allegations of the complaint, and that the district court found a series of facts which have not been alleged, and which defendants necessarily had not undertaken to meet. As this court has held:

> "The proofs must be according to the allegations of the parties, and if the proofs go to matters not within the allegations, the court cannot judicially act upon them as a ground for its decision, for the pleadings do not put them in contestation."
>
> Harris v. Nixon, 9 Peters 483, at p. 502.

We believe that no alleged misrepresentation by Steinfeld except that with respect to the discharge of Nielsen as superintendent (which we deem inconsequential) was both alleged and found.

In order to demonstrate the correctness of this statement, and in order to aid the court in culling from a voluminous and reiterative complaint its essential allegations, we will set forth all the allegations and all the findings on the subject of misrepresentation in parallel columns.

ALLEGATIONS.	FINDINGS.
"That during the last five or six months, said Nielsen was in charge of said mines and smel-	"That neither the said Steinfeld nor the said Curtis made any false representation to

ter as superintendent thereof, said Steinfeld kept representing to said Nielsen through said Curtis that said corporation was getting deeper and deeper into debt * * * and that said corporation was at the time of said shutdown indebted to said firm in the sum of from $75,000 to $85,000." [Folio 13.]

the said Carl S. Nielsen or Mary Nielsen or either of them, with reference to the amount of the indebtedness of the Nielsen Mining and Smelting Company to L. Zeckendorf & Co." [Folios 85-6.]

"That at and prior to the time said Steinfeld wrote said letter, the said mine and smelter of said company were running at a considerable profit, and the debt due from said company to the firm of L. Zeckendorf & Co. was being substantially reduced." [Folio 74.]

"The said Steinfeld * * * falsely represented to the said Nielsen that the indebtedness of the said corporation to said firm of L. Zeckendorf & Co., amounted to from $75,000 to $85,000." [Folio 24.]

Not found, and affirmatively found to be untrue.

"At the time said Steinfeld made said representations that the indebtedness of said corporation to said firm of L. Zeckendorf & Co., amounted to $75,000 to $85,000 * * * he, the said Steinfeld, well knew that said repre-

Not found.

sentations were false when he made them; and that he made said representations for the purpose of deceiving the said Nielsen and for the purpose of acquiring his said shares of stock for a mere pittance of the value thereof, and that the said Steinfeld then well knew that said indebtedness did not exceed the sum of $30,000, if it was that much." [Folios 24-5.]

"That Nielsen had no means of finding out the falsity of said representations, for the reason that all the books and accounts of said corporation were kept under the charge and control of said Steinfeld." [Folio 25.]

"The said Carl S. Nielsen and Mary Nielsen had at all times the means of ascertaining the amount of the indebtedness of such corporation to L. Zeckendorf & Co., and could with reasonable effort have ascertained the same; and in all the transactions herein set forth neither the said Carl S. Nielsen nor Mary Nielsen relied on any such representations." [Folio 86.]

It is furthermore found that at the time Steinfeld wrote the letter of January 3, 1900, he had made up his mind to shut down the mine and smelter for the purpose of acquiring the interest

in the corporation, and for the purpose of acquiring the English group of mines. [Folio 75.]

This finding is responsive to the allegation of the complaint that such as a matter of fact was Steinfeld's purpose in closing down the mine, but it is not alleged in the complaint that Steinfeld either orally or by letter made any representation whatever with respect to his reason for shutting down the mine.

The foregoing excerpts from the complaint and the findings show that none of the allegations of the complaint as to misrepresentations (except as to the discharge of Nielsen) are found; but that on the contrary the representations complained of as false are substantially found to be true, unless it be deemed that Steinfeld's representation to Nielsen through Curtis that the corporation "was getting deeper and deeper into debt" *(supra)* constitutes a misrepresentation.

To us that clause was plainly one of inducement leading up to the main allegation that Steinfeld had falsely represented that the indebtedness was from $75,000 to $85,000.

But even if this allegation could be tortured into one of false representation, then we confidently submit that there is no allegation that Nielsen relied upon it. Furthermore, the plaintiff appears to have by inference expressly excluded it from the misrepresentation upon which it is claimed that Nielsen relied by the following immediately succeeding clause:

"That Nielsen believing the said representations that said corporation was indebted to the said firm in the said sum of from $75,000 to $85,000," etc. [Folio 14.]

The only misrepresentation found by the court is that Steinfeld in his letter of January 3 misstated to Nielsen his true reason for shutting down the mine. This representation not having been alleged, Steinfeld could not have been expected to meet it, or to have anticipated that the court would make a finding with respect to it, and it therefore should be ignored upon this appeal.

Even if it be deemed that Steinfeld's letter that the corporation was making but little headway against its indebtedness, or his representation through Curtis that the corporation was getting deeper and deeper into debt constitute such false representations as might sustain a judgment in favor of the appellant in this case, we respectfully urge that the finding at folio 86 heretofore quoted to the effect that the Nielsens had at all times the means of ascertaining the amount of the indebtedness of the corporation deprives them of all force.

Slaughter's Admr. v. Gerson, 13 Wall. 379;

Long v. Warren, 68 N. Y. 426.

II.

Failure to Disclose Material Facts.

The findings of the court bearing upon this question are to the effect that the mine was shut down exclusively for the purpose of acquiring the Nielsen stock and the English group of mines [folio 78]; that at the time Steinfeld had negotiations for the purchase of the stock he did not inform Nielsen that he had shut down the mines for such purpose [folio 83]; that the English group of mines adjoined the Old Boot, and if acquired for the corporation would greatly add to the value of the stock held by Nielsen, and that at the time Steinfeld wrote the letter of January 3d, 1900, and acquired the stock, he intended and expected that the corporation would acquire the English group of mines, but did not disclose said fact to Nielsen [folio 75]; that at the time Nielsen signed the deeds he did not know that Steinfeld had shut down the mine and smelter for the purpose of acquiring his stock and the English group of mines, but believed that Steinfeld had shut them down for the reasons stated in his letter of January 3, 1900, and acted and relied on such belief [folios 85 and 85]; and that Nielsen died without having learned Steinfeld's true reason for shutting down the mine, and without knowledge of the reasons which influenced Steinfeld in acquiring the 300 shares of stock. [Folio 89.]

There is not even a suggestion in the complaint which can be made the basis of these findings. There is the mere allegation that Steinfeld did shut down the mine for the purpose of acquiring the stock and the English group of mines, and that is all. There is nothing to the effect that he did or did not disclose his motives or plans to Nielsen, or that Nielsen did or did not know of them.

In plaintiff's reply, to which we will presently advert, it is alleged that:

"On the 23d day of February, 1904 (when she received the $10,000), she (Mrs. Nielsen) did not know that the said Steinfeld had shut down said mines for the purpose of forcing said Nielsen out of his interest in said Nielsen Mining and Smelting Company, * * * and avers that the said Steinfeld, both verbally and in writing, represented to the said Carl S. Nielsen that the said company was deeply indebted to said firm and that little headway was being made in reducing said indebtedness, and that for such reasons the smelter should be closed." [Folio 58.]

Apart from the proposition that a reply cannot enlarge the complaint, even these allegations do not suffice to sustain the finding.

The allegation is that Mrs. Nielsen when she received the $10,000 did not know Steinfeld's true purpose in shutting down the mine. Nielsen is expressly excluded from this allegation. While there is an allegation in the reply that Steinfeld represented to Nielsen that his reason for shutting down the smelter was because of the little

headway being made against the indebtedness there is no allegation either in the complaint or reply upon which to support a finding that Steinfeld failed to disclose that his true purpose in shutting down the mine was to acquire the stock and the English group of mines.

III.

The Shutting Down of the Mine.

The shutting down of the mine, whatsoever may have been Steinfeld's purpose in shutting it down, did not constitute fraud.

The allegation on this point is as follows:

"* * * and that on or about the first day of February, 1900, said Steinfeld, although he was neither a director nor an officer of said corporation, undertook to discharge the said Nielsen from his position as superintendent of said company, and Nielsen refused to be discharged by him, and thereupon said Steinfeld ordered said mine and smelter to be shut down, and all work thereat stopped as soon as the then present supply of coke thereat should be exhausted, and about the same time said Steinfeld caused said Nielsen to be informed that he had been discharged as such superintendent by order of the board of directors theretofore made, which was false, and said supply of coke having been exhausted, and said Nielsen being powerless to resist the said Steinfeld, who as managing partner of the said firm of L. Zeckendorf & Co. from whom all moneys, goods and supplies for working said mine and smelter had to be obtained, held the purse strings of said corporation, and believing from said representations that he had been regularly discharged as

such superintendent by said board of directors, did, on or about the 19th day of February, 1900, shut down said mine and smelter and ceased all work thereat, and relinquished his said position as superintendent." [Folios 12 and 13.]

It will be remembered that it is the finding that Steinfeld's domination over the corporation consisted of his having the control over the credit to be extended to the corporation, and the power to vote a majority of the stock. Also, that Zeckendorf & Co. was under no obligation to extend credit, and had the right at any time to enforce the collection of the amount owing to it. [Folio 72.]

By refusing to be discharged, Nielsen showed that he was not under Steinfeld's domination, as Curtis and Shelton are found to have been. Nielsen's shutting down of the mine, therefore, was not the effect of Steinfeld's order that he should do so, but of the fact as alleged in the complaint that the coke was exhausted; that he had no money, goods or supplies, *and that Steinfeld held the purse strings of the corporation.* Literally speaking the mine was not shut down by order. It shut down. Its furnace went out. It had no supplies, and it stopped; and this is the allegation of the complaint.

It certainly cannot be argued that fraud can be predicated upon the doing of a legal act performed in a legal way.

We can conceive that where one in domination of a corporation plunges the corporation into debt with the sinister purpose of foreclosing such indebtedness for the benefit of himself and to the disadvantage of the other stockholders, the enforcement of the debt incurred under such circumstances and with such intent might constitute actionable fraud. But such is not this case.

It is found by the court:

"That during the year 1899 large amounts of money were expended in developing and working said mine and in the purchase and erection of machinery, buildings and other improvements at such mine and smelter, and thereby substantial quantities of valuable ore were discovered and developed therein and the value of said mine was substantially increased thereby." [Folio 72.]

There is no suggestion in the complaint or findings that the corporation was burdened with indebtedness improperly or for any wrongful purpose. The proximate cause of the shutting down of the mine, whether it was the act of Nielsen or of Steinfeld was the refusal of L. Zeckendorf & Co. through Steinfeld to extend further credit. Such withholding of credit being a legal act cannot be actionable whatsoever may have been the purpose which animated Steinfeld.

A creditor who in fact dominates a corporation may, as stated by the Supreme Court in its opinion, be a trustee just as if he were its director or managing officer. In such event the trusteeship

exists in that the party as a matter of fact controls the corporation and dominates its policies and management; the corporation and its officers yielding to his dominating influence because they are constrained to succumb to the power which as creditor he would be able to exercise. But there is a manifest distinction between the actions of such a dominating power in work of corporate management and between his action as a mere creditor in withholding credit. Steinfeld may have had the power to compel the directors of the company to do his will; but the withholding of credit was the action not of Steinfeld, the controller of the management of the corporation, but of Steinfeld the creditor, acting exclusively as such.

IV.

The Allegations that Nielsen Relied Upon Any False Representation or was Ignorant of Any Alleged Fraud, are Not Found by the Court to Have Been Proven.

In support of the above proposition, we will again have recourse to the parallel column, all of the allegations and findings with respect to the subject-matter of the foregoing proposition being as follows:

ALLEGATIONS.	FINDINGS.
"The said Nielsen believing said representations that said corpora-	

tion was indebted to the said firm in the sum of from $75,000 to $85,000 * * * he, the said Nielsen, and his wife, the said Mary Nielsen, were by said representations and threats driven, defrauded and coerced into signing the agreement of June 29, 1900." [P. 14, folios 28-29.]

Not found.

"On the 29th day of June, 1900, the said Steinfeld also required and compelled the said Carl S. Nielsen and Mary Nielsen to sign and deliver to him a written transfer of said 300 shares of stock." [P. 20, folio 46.]

Not found

"That the said Nielsen and his wife Mary Nielsen relied upon the said representations of the said Steinfeld made as aforesaid (referring to the representations as the $85,000 indebtedness heretofore and in the preceding proposition quoted) and believed the same to be true, and had no means of finding out the falsity of such representations, for the reason that all the books and accounts

Not found, and affirmatively found to be untrue.

of said corporation were kept under the charge and control of the said Steinfeld." [P. 25, folios 61-62.]

"That the said Carl S. Nielsen died without ever having learned of the falsity of the said representations of the said Steinfeld as to the amount of indebtedness of the said corporation to said firm (and as to said Nielsen having been removed as such superintendent by order of the Board of Directors of said company)." [P. 29, folio 74.]

Not found except as to the clause in parentheses.)

"That on or about the 19th day of February, 1900, the said Nielsen believing he had been regularly discharged as such superintendent by the board of directors, and believing the statements of the said Steinfeld in his letter of January 3, 1900, and having all his means invested in said company, and the existing supply of coke then at the smelter being exhausted, and the said Nielsen being powerless to obtain supplies to run said mine and smelter, and all the

Not alleged that Nielsen believed the statements in the letter of January 3, 1900.

assets of the said corporation being under the control of said Steinfeld, did shut down the said mine and smelter and cease to be in possession and control thereof. [P. 77, folios 218-9.]

"That at the time said Steinfeld entered into negotiations for the purchase of the stock of the said Nielsen * * * he did not inform the said Nielsen that he had shut down the mine and smelter of said Nielsen Mining and Smelting Company for the purpose of getting rid of the said Nielsens and for the purpose of acquiring the English claims." [P. 83, folio 237.]

Not alleged.

"That the said Nielsen at the time he signed said deeds and executed the said contract * * * did not know that the said Steinfeld had shut down said mine and smelter for the purpose of getting rid of Nielsen and acquiring his stock, and did not know that the said mine and smelter had not been

Not alleged.

shut down when the same was making money in order to enable the said Steinfeld to acquire title to the English group * * * but the said Nielsen believed that he had been legally and duly discharged, and that the said Steinfeld had shut down said mine and smelter for the reasons stated in his letter of January 3, 1900, and acted and relied on said belief." [Pages 84-5, folios 239-240-1.]

Not alleged.

"That the said Carl S. Nielsen died on the 6th day of March, 1901, without having learned of the facts hereinbefore found as to the reasons or any of them for said Steinfeld causing the said mine and smelter to be shut down which compelled said smelter and mines to be shut down, and without knowledge of the reasons which influenced the said Steinfeld in acquiring said 300 shares of stock." [P. 98, folio 253.]

V.

Judgment Cannot be Supported Upon Allegations in the Reply Which are Not Contained in the Complaint.

The appellees in the answer set up a general release executed by appellant as a defense to the cause of action stated in the complaint. Appellant thereupon filed a reply in which, after several demurrers, it was alleged:

"Comes the plaintiff and subject to the demurrer filed to the separate and further defense of defendant filed in this cause on March 30, 1908, *for reply to the answer of defendant to plaintiff's third amended complaint* plaintiff says that at the time the said sum of ten thousand dollars was paid to her by the said Steinfeld on the 23rd day of January, 1904, etc." [P. 57, folio 159.]

It is submitted that under the decisions the averments of such pleading are only material insofar as they meet the special defense set up in the answer, to-wit: The general release executed at the time of the payment by Steinfeld to the appellant of the ten thousand dollars, and that, therefore, such averments are insufficient to sustain the present judgment.

18 Enc. P. & P., 707;
Vattier v. Hinde, 7 Peters 253 at p. 274;
Thornton v. Kaufman, 35 Mont. 181, 88 Pac. 796;
Kearney Co. Bank v. Zimmerman, 5 Neb. 556, 99 N. W. 524;
Lilienthal v. A. P. Hotaling Co., 15 Ore. 371, 15 Pac. 630.

In Distler v. Dabney, 3 Wash. 200; 28 Pac. 335, the statute with reference to the right to reply is in practically the same language as the statute of Arizona. Commenting upon the effect of the reply and its relation to the complaint, the court says:

> "To allow the plaintiff to prove his case on the averments of either the complaint or reply, as it happened to suit him; to obtain a judgment for money had and received, or upon a rescission of the contract for the purchase of land, as the testimony happens to serve, would be to allow him to go fishing for a judgment; while the defendant would be uncertain what he was called upon to defend until the testimony of plaintiff had been submitted. In Garvey v. Fowler, 4 Sandf. 665, the court said: 'It is one of the merits of the code that general averments and general issues, which convey no information to the opposite party and were frequently construed in a sense not only different from, but distinctly opposite to that which their terms impute, are now abolished. The plaintiff must now state in his complaint all the facts which constitute the cause of action, and we are clearly of the opinion that every fact is to be deemed constitutive in the sense of the code, upon which the right of action depends; every fact which the plaintiff must prove to enable him to maintain his suit and which the defendant has a right to controvert in his answer must be distinctly averred; and every averment must be understood as meaning what it says; consequently is only to be sustained upon evidence which corresponds with its meaning.' This we believe fairly states

the law and proper practice under the Code Procedure."

A plaintiff can recover only on the cause of action stated in his petition.

"It is not the province of a reply to introduce new causes of action. This can be done only by amendment of the petition."

VI.

The Facts Found by the District Court are Insufficient to Support the Judgment of that Court.

Assuming that the cause of action was not barred by the statute of limitations, and that all facts found by the District Court were properly alleged in the complaint, we, nevertheless, submit, as held by the Supreme Court, that the facts as found, are insufficient to support the judgment.

THE FACTS FOUND DO NOT CONSTITUTE FRAUD.

If we extract from the findings the facts which are most favorable to the contention of appellant, and for the moment eliminate such other findings as qualify or explain them, the following is the strongest array of facts which can be adduced in support of fraud.

1. Steinfeld dominated and controlled the corporation.

2. Such domination arose out of the fact that

(a) The corporation was largely in debt to L. Zeckendorf & Co.;

(b) Steinfeld controlled a majority of the stock of the corporation;

(c) Curtis and Shelton were employes of the firm of L. Zeckendorf & Co., and under Steinfeld's control;

(d) Nielsen was without means to secure the necessary supplies and advances to operate the mine and smelter;

(e) Steinfeld had the power to determine whether further credits should be extended to the corporation, and had the legal right to cease giving further credit and to enforce the collection of the amount which the corporation owed to L. Zeckendorf & Co.

3. On the 3d of January, 1900, the corporation was heavily in debt to L. Zeckendorf & Co. and $15,000 was unpaid upon the option to purchase the mine.

4. In October, November and December, 1899, and January, 1900, the smelter was in active operation and the sale of the product of the smelter was materially reducing the debt owing to L. Zeckendorf & Co.

5. Steinfeld in his letter of January 3, 1900, to Nielsen gave as his reasons for shutting down the mine,

(a) The large indebtedness existing against the company;

(b) The fact that little headway was being made toward the liquidation of such indebtedness.

6. At the time Steinfeld wrote said letter, the indebtedness of the corporation to L. Zeckendorf & Co. was being substantially reduced, and the mine and smelter were being run at a considerable profit, and this was known to Steinfeld. At the time Steinfeld wrote said letter he had made up his mind to shut down the mine and smelter for the purpose of acquiring Nielsen's stock and for the purpose of acquiring the English claims, and the acquisition of such English claims would greatly add to the value of Nielsen's stock, and Steinfeld did not disclose to Nielsen his true purpose of shutting down the mine.

7. On the first of February, 1900, Steinfeld undertook without authority to discharge Nielsen and Nielsen refused to be discharged. Thereafter Curtis and Shelton made a false entry in the minute book of the corporation tending to show that Nielsen's discharge by Steinfeld on the first of February, 1900, was authorized.

8. On the 19th of February, 1900, Nielsen shut the mine down, because,

(a) He believed he had been regularly discharged as superintendent;

(b) All of his means were invested in the corporation;

(c) The existing supply of coke at the smelter had been exhausted and Nielsen was powerless to obtain supplies to run the property.

9. If the development work had not been

stopped by Steinfeld on the 3d of January, 1900, sufficient ore would have been developed prior to the shut down in February for lack of ore, to have supplied the smelter with ore for continued operation.

It is obvious that no fraud can be predicated upon these facts except upon the assumption that Steinfeld made use of his domination over the corporation to shut the mine down, and that however fradudulent may have been his intent and acts, the sale was not superinduced by fraud, unless, as a matter of fact, the mine was shut down by Steinfeld.

It is submitted that the allegations of the complaint and the findings show that despite the court's finding that Steinfeld dominated the corporation, it was not Steinfeld who shut down the mine, but Nielsen himself. Nielsen as superintendent had direct authority over the employes of the corporation who did the operating of the mine and the smelter. The findings preclude the idea that Nielsen was obedient to Steinfeld. When Steinfeld undertook to discharge him, he refused to be discharged; and the court finds that Nielsen shut the mine down, not because Steinfeld ordered him to do so, but because the supply of coke was exhausted, and he had no means of obtaining further supplies. These reasons, moreover, were unimportant and futile in connection with the

further finding of the court that at the time the mine was shut down, all ore which had been developed was exhausted.

The court has also found that Nielsen was familiar with the condition of the mine. [Fol. 78.] Therefore Nielsen knew that the ore was exhausted.

It cannot be argued that Steinfeld was under any obligation to supply further credit to the mine for the purpose of development, for the court has found that the firm of L. Zeckendorf & Co. was under no obligation to extend credit.

Grant that it was Steinfeld's orders which stopped development work on the 3d of January, 1900. It certainly cannot be argued that the firm of L. Zeckendorf & Co. was under any obligation to continue development work. Development work is at best a speculation, and the most able mining expert can do no more than conjecture whether development work will be a fruitless expenditure of money or will result in the uncovering of valuable ore.

The finding of the court is that if development work had been continued, sufficient ore would have been developed to supply the smelter with ore. Although denominated by the court a finding of fact, this cannot be seriously considered, with whatsoever solemnity it may be expressed, as anything more than the expression of an opinion,

or at most a finding that sufficient ore would have been developed had the ore been there.

EVEN IF STEINFELD HAD SHUT THE MINE DOWN, SUCH ACT DID NOT CONSTITUTE FRAUD.

It is true that the court finds that one of Steinfeld's purposes in shutting the mine down was to acquire Nielsen's stock; but there is no finding that Steinfeld wished to acquire it for less than its value or to acquire it by reason of its being a valuable asset and one to be desired, and it will not be assumed that the court so meant in its finding.

The court did not find that Steinfeld wished to defraud Nielsen in getting rid of him or acquiring his stock. It is not found, nor is there any evidence to support the contention that Steinfeld wished to take any advantage of Nielsen.

In conclusion, herefore, on the subject of shutting down the mine:

First: The mine was not shut down by Steinfeld but by Nielsen.

Second: If the development work was stopped by reason of Steinfeld's order, such order was obeyed by Nielsen, not because Steinfeld, controlling a majority of the stock or the board of directors, so directed, but, as alleged in the complaint, because Steinfeld as managing partner of L. Zeckendorf & Co. held the purse strings, and his refusing to unloosen them must necessarily result in a cessation of work.

Third: Steinfeld as creditor had the right to use his power to prevent the expenditure of the visible assets of the company in development work which was necessarily speculative.

Fourth: The money making feature of the corporation, to-wit, the smelter, was operated as long as there was any ore susceptible of treatment. Therefore it can not be contended that Steinfeld stopped the corporation in a career of money making in order that it might be at the mercy of his firm as a creditor.

Fifth: There is no finding of an intent on Steinfeld's part to do Nielsen any injury in shutting down the mine; or, in other words, to induce Nielsen to sell his stock for less than its actual value.

STEINFELD WAS NOT A TRUSTEE FOR NIELSEN AND THE RELATIONS BETWEEN THEM WERE NOT OF A FIDUCIARY CHARACTER.

It is contended that Steinfeld's relations to Nielsen were of such a fiduciary character that apart from any misrepresentation, he was under the duty to disclose to Nielsen his true purpose in shutting down the mine and his contemplated plan to acquire the English group of mines.

At the outset we suggest for the court's consideration,

First: That Nielsen was a director of the company and had equal opportunities with Steinfeld

to know the financial condition of the corporation, and that at the time the smelter shut down, he knew the condition of the mine; and

Second: That it is not claimed that Steinfeld failed to disclose to Nielsen any *fact* bearing upon the value of the stock.

What he failed to disclose was his *motive* in shutting down the mine and his *intention* to acquire the English group of mines.

As superintendent and manager of the mining operations of the company from the beginning, it must be presumed that Nielsen had more accurate knowledge than Steinfeld of the benefits to be derived by the acquisition of the English group.

It cannot be claimed that it was Steinfeld's duty either with his own money or the money of L. Zeckendorf & Co. to purchase the English group of mines for the corporation. The corporation had no funds with which to purchase them, and it is unreasonable to infer that if Steinfeld or L. Zeckendorf & Co. proposed to acquire them, it was their duty either equitable or moral, to advance money to the corporation for such purpose, they taking all the risk, and Nielsen receiving thirty per cent of the profits, if any. It would have been eminently proper for L. Zeckendorf & Co. under the circumstances before expending money in any such investment, to negotiate with Nielsen for the purchase of his stock.

We furthermore suggest that there is no finding that Nielsen did not know that Steinfeld intended and expected to acquire the English group of mines. The finding is that Steinfeld did not disclose his purpose to Nielsen. Why should he disclose it, if the purpose was already known to Nielsen? The finding of a failure to disclose means nothing, unless coupled with the finding that Nielsen had no knowledge of the matter not disclosed.

Without respect to the foregoing considerations, however, we submit as a matter of law, that while there is conflict, the weight of authority is that there is no fiduciary relationship between a director and a stockholder in transactions relating to the disposition of the stock belonging to the stockholder.

Carpenter against Danforth, 52 Barb. 581, was an action brought to have a sale of corporate stock declared void, and the plaintiff restored to the rights and interests which he would have had, had the sale not been made. It appeared that the defendant was a director of the corporation, and purchased the plaintiff's stock without disclosing to him certain facts known to the defendant but not to the plaintiff bearing on the value of the stock. In an elaborate opinion it was held that no trust relation existed between the director and the stockholder with reference to the plaintiff's stock, but that such relation of trust

and confidence was limited to the property and affairs of the corporation itself, and that the sale could not be set aside upon any theory of constructive fraud or mere failure to disclose information, which the defendant had bearing upon the value of the stock, but only actual fraud practiced by the defendant upon the plaintiff. In the course of the opinion, the court said:

> "There was certainly a trust relation between the plaintiff as the holder of, or as the person having the legal title to, the shares of stock, and the defendant Danforth, as a trustee or director. A corporation aggregate can only act by agents. Its trustees or directors are its agents for managing its affairs. They are such agents, viewing the corporation either in the abstract, as an immaterial thing, of legislative creation, with a name and certain powers and rights given by law, or as composed of its corporators or shareholders, having the right to share pro rata in its dividends. There is, therefore, a certain trust relation between the shareholders and the directors of a corporation; but the trust put in the directors usually extends, and I must assume that in this case it extended only to the management of the general affairs of the corporation, with a view to dividends of profits; and, therefore, that the trust relation between the plaintiff and the defendant Danforth extended no farther. The title to the property of a corporation is in neither the directors nor shareholders. It is in the corporation as an abstract, immaterial thing of legal creation. The directors are not trustees for the sale of the stock of the corporation. They have no power *as di-*

> *rectors* to sell stock; they have no power to sell any stock but their own. The defendant Danforth was not a trustee for the sale of the plaintiff's stock. The plaintiff's *stock* was not the subject of trust between them, nor had the trust relation between them any connection with the plaintiff's stock, except so far as the good or bad management of the general affairs of a corporation by its directors, indirectly affects the value of its stock."

In Gilbert v. Bowen, 23 Federal, at page 626, Judge Brewer rendering the opinion said:

> "As officers of the corporation they occupied trust relations to it, and in the faithful performance of such trusts they would indirectly subserve the interests of the other stockholders. But trust relations to the corporation do not as to the stockholders create trust relations *inter esse*. What ever duties they owed to the corporation, as between themselves they dealt at arm's length, and neither had special charge of the other's interests."

In Walsh v. Goulden, 130 Mich. 531; 90 N. W. 406, the action was to set aside certain transactions of the directors of the corporation in which the plaintiff was a stockholder. The rule as to the relations between stockholders and directors is stated by the court as follows:

> "Directors, of course, stand in a fiduciary relation to the corporation itself. They do not stand in that relation, however, when dealing with other stockholders, for the purchase or sale of stock. In the purchase and sale of stock between stockholders there

must be some actual misrepresentation in order to constitute fraud." (See 90 N. W., at p. 410.)

In Board of Commissioners against Reynolds, 44 Ind. 509, the question was elaborately considered, and it was held that the trusteeship of directors and stockholders applies only to property of the corporation and not to the shares owned by the stockholder, and that a contract having reference to the sale of stock of an individual stockholder could not be set aside except for actual fraud. (See page 515.)

In Cromwell v. Jackson, 53 N. J. Law, 656; 23 Atl. 426, the court said:

> "A director or treasurer of a corporation is not because of his office in duty bound to disclose to an individual stockholder before purchasing his stock that which he may know of the real condition of the corporation affecting that stock. He is to some extent trustee for the stockholders as a body in respect of the object and business of the corporation; but does not sustain that relation to individual stockholders with respect to their several holdings of stock over which he has no control."

In Rothschild v. Memphis & Charleston R. R. Co., 113 Fed. 476, at page 479, it is said:

> "Stockholders are not tenants in common of the property of the corporation and a stockholder as such, even though he owns a majority of the stock, does not occupy a trust relation toward the other stockholders and

he may deal with them or with the corporation in good faith."

In Haarstick v. Fox, 9 Utah 110, 33 Pac. 251, quoting the syllabus:

> "There is no confidential relation subsisting between a corporate officer and a stockholder, from which a presumption of fraud will arise in case of a sale of stock by the latter to the former."

In Cook on Corporations (5th Ed.), sec. 320, page 707, the rule is thus stated:

> "A director of the corporation itself may buy and sell its stock like any other individual. The information which he has of the affairs of the corporation, whereby he is enabled to buy or sell at an advantage over the person with whom he deals, does not affect the validity of the transaction. He is entitled to the benefit of his facilities for information. There is no confidential relation between him and a stockholder, so far as a sale of the stock between them is concerned; and, so long as he remains silent and does not actively mislead the person with whom he deals, the transaction cannot be set aside for fraud."

In Deaderick v. Wilson, 67 Tenn. (8 Jere Baxter), 108, the question is elaborately considered and we quote at length from the opinion of the court for a clear and accurate statement of the rule above stated.

> "The facts on which this latter branch of relief is prayed may be substantially stated as follows:

"It is alleged that Wilson, Jaques, McGhee & Johnson, with other officials and directors of the corporation, receiving salary as such, conceived and formed the design and scheme of speculating in the stock owned by complainants, and others on whose behalf they sue, to the damage of the owners of the stock, and profit of said respondents; that they availed themselves of their superior knowledge, influence and power, and other advantages incident to their position as such officers and directors and as trustees for the stockholders to carry said scheme into execution, and procured the smaller stockholders to transfer to them their shares of stock at prices far below their par value, and far below the price that their superior information enabled them to foresee said shares would command.

"Stripped of all verbiage, this charge is simply that officers and directors of a railroad corporation have purchased stock of parties in small amounts of stock at below par value of the stock, and below the value they foresaw it would command—that is, in the future—and that they so purchased because of their superior knowledge of the real value of the stock, or their superior foresight as to its future value, which knowledge was obtained by means of their official position.

"The legal proposition that underlies it, on which relief is sought, and the charge made is that the officer and director of a corporation of this kind, are trustees for the stockholders or individual owners of the stock, and as such can not be allowed to make a profit out of their trusts—the rule applicable to all trustees in courts of equity. On the

correctness and accuracy of this position all of this branch of the case made by the bill turns, assuming for the present but not deciding that complainants have presented themselves before the court to obtain this relief. To this question we now address ourselves.

"Numerous cases both in England and this country have settled that the position of a director is in some sense of a fiduciary character; in most of them directors are stated to be trustees for the stockholders. That this is true in some particulars is true beyond all question. Overend, Gurney & Co. v. Gibb, 3 Vol. Eng. R. 7-17; Liquidators v. Colemand, 6 Vol. Eng. R. 26-33; 1 Redf. on Railw. 576; and various authorities cited in principal brief of Shields Counsel, pp. 29-30-31; Board etc. v. Reynolds, June, 1874, No. Amer. L. Reg., p. 376, decided by Supreme Court of Ind.

"To call directors of a corporation trustees for the stockholders, however, without limiting the use of this term by the facts of the case in which the question has been presented for adjudication, is calculated to mislead and induce a very wrong conclusion as to the liabilities of officers or rather agents or corporations. * * *

"The corporation, the legal entity owns the franchise and corporate property. The officers and directors are the agents through whom this legal entity acts and in the performance of the duties pertaining to their position, represent the corporation. And so, with reference to the stockholder who by virtue of his ownership as his individual property is entitled to the dividend properly accruing to him as owner of such shares of

stock, the officers and directors are under obligation to the faithful management and use of the corporate franchise and property, so as to secure him the benefit of such dividends. In both cases they are responsible under certain circumstances in any proper proceeding in a court of equity and possibly in some cases in a court of law, for any wrong conduct in violation of the rights of either the corporation or injuriously affecting the interests in which the stockholder is concerned. In a word, they are agents charged with the performance with fidelity of the duties that grow out of their position as defined by the power, object and purpose of the charter of the company. To this extent is their position fiduciary, and for breaches of good faith in the performance of these trusts they are held responsible. These general propositions, though sound in our judgment, may in their application to particular cases, require some qualification; but as general propositions we think they embody the true idea on which the responsibility of such parties rest, as deducible from the case and the nature of the positions themselves. * * *

"It being clear and beyond all question both on sound principle and authority that the directors or officials of the company were charged with no trust in reference to the sale or disposition, the management or control of the shares of stock owned by the individual stockholders, it follows that none of the responsibilities growing out of this relation attach to them in making such purchase from the stockholder as are contended for by the complainant, and that this feature of the bill cannot be maintained, and the demurrer was properly sustained on this question.

"It is proper to say that in all the cases and other authorities cited by complainant's counsel in his learned and elaborate argument, in which directors are called trustees, not one of them hints that they are trustees, or have any fiduciary relation whatever to the shares of stock owned by the stockholders so far as selling or buying such stock is concerned, they are all of quite a different character from the case now under discussion and the trust relation was applied to a very different state of facts.

"We cite a few of these authorities by way of illustration.

"In Story's Eq., Vol. 2, Sec. 1564, it is said:

" 'So, too, courts of equity will require the officials of joint stock companies to account for monies received in trust for the company. The directors of a company on the transfer of its business to another company received from the latter a large sum of money for compensation, the particulars of which they withheld from the members and it was held that they were trustees of the money for the members, and they were ordered on application for injunction to pay it in court.' It is obvious that this has no application to the question which we have discussed. We need not go through with the authorities cited by counsel. They are all cases where the directors have either made a profit out of the use of the corporate property or derived some personal advantage which of right ought to have gone to the corporation of which they were agents or managers, and in which the shareholder, as a member of the corporation, had an interest that was or might have been injured by the wrong done.

> They were properly held responsible as trustees in such cases, because of a violation of duties assumed and growing out of their relations to the corporation and its members of which they were officers; but no case has been found, nor do we believe can be, where a trust has been fixed on any officers or directors of a corporation in relation to the individual shares owned by the stockholder as his private property. With this, as we have said, the officers, as such, of the corporation have no concern or connection whatever, either in law or in fact. Liquidators etc. v. Coleman & Knight, 6 Vol. Eng. Reps. 18; Post v. Russell, 36 Ind. 60, Amer. R., p. 5, Vol. 10, and cases cited; Overend G. & Co. v. Gibbs; House of Lords Cases in Eng. R. p. 1; Koeler v. Black River Falls Co., 2 Bl. 716-17-18.'"

In O'Neile v. Ternes, 32 Wash. 528; 73 Pac. 692, at p. 696, decided in 1903, it is said:

> "As to the contention that the respondent, Ternes violated his trust duties and obligations as an officer of the transfer company by not apprising appellant of the true condition of the company and its business, and of the value of its stock, it is perhaps sufficient merely to observe that no such trust relation as is claimed by appellant ever existed between the latter and Mr. Ternes. The rule recognized and adopted by the modern authorities is tersely stated by a late textwriter, speaking of officers of private corporations, as follows: 'The doctrine that officers and directors are trustees of stockholders applies only in respect to their acts relating to the property or business of the corporation. It does not extend to their private dealings with

stockholders or others though in such dealings they take advantage of knowledge gained through their official position.' Sec. 21 Am. & Eng. Enc. of law 898 and cases cited."

In Hooker v. Midland Steel Co., 215 Ill. 444; 74 N. E. 445, at p. 447, decided in 1905, it is said:

"A director, however, does not sustain that relation to an individual stockholder with respect to his stock, over which he has no control whatever, but he may deal with an individual stockholder and purchase his stock practically on the same terms as a stranger. In the absence of actual fraud, such a purchase will not be set aside for a mere failure to disclose any information the director may have affecting the value of the stock. The rule as to a director is stated in Cook on Stock & Stockholders, as follows: 'There is no confidential relation between him and a stockholder, so far as a sale of the stock between them is concerned; and so long as he remains silent, and does not actively mislead the person with whom he deals, the transaction cannot be set aside for fraud.' Beatty did not sustain such a trust relation to the complainant, as an individual stockholder, as would prevent him, in the absence of actual fraud from purchasing the stock." The same doctrine is laid down by Morawetz. 1 Morawetz on Private Corporations, 357.

The Supreme Court of Arizona in its opinion rather adopts a contrary view upon the authority of the cases of

Stewart v. Harris, 69 Kas., 498; and
Oliver v. Oliver, 118 Georgia 362, 45 S. E. 232.

The case of Oliver v. Oliver is not entirely inconsistent with the doctrine as above set forth. The court says, "if the market or contract price of the stock should be different from the book value, he (the director) would be under no legal obligations to call special attention to that fact, for the stockholder is entitled to examine the books and this source of information at least theoretically is equally accessible to both."

The finding of the court that Nielsen had full opportunity to know the indebtedness of the company at the end of each successive month, and to ascertain whether much or little headway was being made in its liquidation, in connection with the fact that Nielsen was a fellow director and had been the active superintendent of the mine from prior to the organization of the corporation until the time of the shut down, would have constrained the Georgia court to hold that Steinfeld occupied no fiduciary relations to Nielsen.

In the case of Stewart v. Harris, the only other decision cited by appellee, the facts were these:

Stewart was over eighty years of age, knew nothing about banking. He went to Harris, the president of the bank, before selling his stock, and inquired about the condition of the bank and asked if a dividend would be paid. Defendant informed him the bank would pay no dividend. He told him about the bad conditions of the affairs of the bank at the time he had taken charge of it, and

the large amount of paper which the bank had then charged off, and gave him no further knowledge nor information of the affairs of the bank than to tell him that it was in good condition. As soon as Harris bought this stock and 98 shares of the stock which was in the treasury, which he obtained for much less than the real value, he declared a dividend of 120 per cent, and other dividends soon followed.

It futhermore appears that the payments of the notes which had been charged off on the books of the bank instead of being carried in the profit and loss account, were carried in the cashier's accounts, and that funds carried in such account did not appear as assets of the bank, and real estate charged off on the books of the bank did not appear in the published reports of the conditions of the bank, neither did the funds carried in the cashier's account.

No dividends had been paid in the two years the plaintiff was owner of the stock. It appears that the actual book value of the stock was over twice what the plaintiff paid for it. The court says:

> "Before any managing officer of a bank who is acquainted with its conditions and affairs can rightfully purchase the stock of such bank from stockholders who *are not actively engaged in the management and operation of the bank,* such managing officer must inform such stockholders, etc. * * *"

> "And the purchase from a stockholder *who is not acquainted with the conditions and affairs of the bank*, of his stock in the bank by one of the managing officers * * * is fraud on the part of such managing officer, provided the stockholder does not himself know the value of the stock."

The whole theory of both textwriters and authorities is that in order to set aside a sale, the party seeking to set it aside must either actually or constructively have reposed confidence in the other party, which confidence was betrayed.

There is not a single case where one director of a corporation has been held to be trustee for a co-director.

The principle invoked would interfere with the entire business of buying and selling stock. Every time a director buys property on the market, he would run the risk of suits brought against him for rescission, on the theory that he had information with respect to the value of the stock which was not disclosed to the party who made the sale. The principle is a most dangerous one and should never be acknowledged except in connection with facts which as in the case of Stewart v. Harris show a request for information and an answer, which by reason of not being full was in effect a misrepresentation.

A most instructive case was decided by the English court of Chancery in 1902.

This is peculiarly in point upon the contention of appellees that it was Steinfeld's duty to disclose his contemplated plan to purchase the English group of mines, and so far as the case at bar is concerned, reconciles the cases of Oliver v. Oliver, and Stewart v. Harris, with the other authorities cited. We call particular attention to the concluding portion of the quotation which we have taken the liberty to put in italics. The case to which we refer is Percival v. Wright, 2 Chancery Division, 471. The court holds:

> "It is contended that a share holder knows that the directors managing the business of the company in the ordinary course of management, and impliedly releases them from any obligation to disclose any information so acquired. That is to say, a director purchasing need not disclose a large casual profit, the discovery of a new vein or the prospect of a good dividend in the immediate future, and similiarly a director selling shares need not disclose losses, these being merely incidents in the ordinary course of management. But it is urged that as soon as negotiations for the sale of the undertaking are on foot, the position is altered. Why? The true rule is that a shareholder is fixed with knowledge of all the director's powers, and has no more reason to assume that they are not negotiating a sale of the undertaking than to assume that they are not exercising any other power. It was strenuously urged that, though incorporation affected the relations of the shareholders to the external world the company thereby becoming a distinct entity, the position of the shareholders

inter se was not affected, and was the same as that of partners or shareholders in an unincorporated company. I am unable to adopt that view. *I am therefore of opinion that the purchasing directors were under no obligation to disclose to their vendor shareholders the negotiations which ultimately proved abortive. The contrary view would place directors in a most invidious position, as they could not buy or sell shares without disclosing negotiations, a premature disclosure of which might well be against the best interests of the company.* I am of opinion that directors are not in that position."

The foregoing suggestions of the English Chancellor seem to throw light on the reason for the rule. A director is a trustee for the entire corporation, and his duty requires him to withhold information from the public. All stockholders know this. It is admitted that he does not occupy such a trust relationship to a stockholder as to prohibit him from dealing with such stockholder with respect to such stock. (See Pomeroy Eq. Juris. cited by appellant.) If, therefore, in any dealings which he may have he is guilty of fraud unless he discloses everything pertaining to the value of the stock which he knows, such duty might seriously interfere with his duty to the corporation and to all of the stockholders to withhold knowledge of its affairs from the public. Therefore, the director is not bound to disclose anything whatever when he trades with a stockholder for his stock. The stockholder knows

that the director is not bound to disclose. He furthermore knows that such director by reason of his office has more accurate and reliable information as to the condition of the corporation, and therefore as to the value of its stock than he has. When, therefore, a director tries to sell stock of the corporation to a stockholder or any one else, such stockholder, knowing that he is a director, should be at once on his guard and infer from the desire of the director to sell that he has some knowledge tending to diminish the value of the stock; and so when a director offers to buy stock. the stockholder likewise knows that the director, probably, has inside information tending to enhance the value of the stock. If with this knowledge of the director's opportunity for exclusive information the stockholder still deals with him, (without asking direct questions which would bring out the facts or induce a misrepresentation and actual fraud) he does so with his eyes open and the transaction lacks the essential element of confidence reposed and betrayed.

FINDING THAT SUFFICIENT ORE WOULD HAVE BEEN DEVELOPED MEANS NOTHING.

The finding that although the ore was substantially exhausted when the smelter was closed in February, sufficient ore would have been developed to have kept the smelter continuously running if Steinfeld had not shut down the mine

in January, does not tend to support the judgment based on fraud.

It is neither alleged nor proven that Steinfeld *knew* that further development would have disclosed more ore, hence a fraudulent intent in shutting the mine down in January cannot be inferred from such finding.

We therefore respectfully submit that the facts as found by the court are not sufficient to sustain the judgment, and that if the entire findings of the court had been embodied in a complaint, the complaint would have been demurrable in that it did not state facts sufficient to constitute a cause of action.

It will be borne in mind that the essential allegation in the complaint, which saved it from being demurrable, was that Steinfeld represented to Nielsen that the corporation was indebted to Zeckendorf in the sum of $85,000, when, as a matter of fact, its indebtedness was inconsiderable. This, if true, would have been a false representation directly bearing upon the value of stock, and would have been actual fraud, and to such extent sufficient to authorize a judgment for rescinding the sale.

It was expressly found by the court that this allegation was untrue.

VII.

The Shutting Down of the Mine by Steinfeld With the Intent Thereby to Induce Nielsen by Reason of his Financial Necessities and the Financial Condition of the Mine to Sell his Stock is Not Such Fraud as Would Render the Sale of the Stock Voidable.

It has already been argued that Steinfeld as creditor had the legal right to shut down the mine; that the shut down was made necessary by the failure of ore.

There is no allegation or finding that in shutting the mine down, partially for the purpose of getting rid of the Nielsens, Steinfeld acted in bad faith, and while it is alleged in the complaint that his purpose was to acquire Nielsen's stock for a mere pittance, there is no finding to such effect.

It is now submitted as a matter of law that, even if Steinfeld's purposes had been sinister and his motives in shutting down the mine had been to get Nielsen's stock for less than its value, even then such conduct on his part, while reprehensible and, for some kinds of relief perhaps fraudulent, was not so connected with the purchase of stock as to be fraudulent to the extent of rendering the contract in question void or voidable.

The case of Grant v. Attrill, 11 Fed. 469, was an action to set aside a conveyance of 200 shares of the capital stock of the Crescent City Light Company made by the plaintiff to the defendant,

and to have the defendant declared a trustee for the plaintiff of the stock and its avails. The defendant demurred.

It was alleged in the complaint that the plaintiff was the owner of the 200 shares of stock on which fifty cents per share had been paid; that the defendants and others controlling the corporation made an assessment upon the subscription for stock and threatened to make others rapidly for the purposes of the corporation, when, in fact, they were not necessary for those purposes, and which they did not intend to enforce if they could purchase the rest of the stock. That thereupon the plaintiff sold his stock to the defendant at $2.50 per share; that the assessments were not made and collected and the stock had turned out to be of great value. The court sustained the demurrer, saying:

> "The validity and force of this transaction are to be determined by the facts as they then existed, and such representations and concealments as were then made. If the sale was not so tainted with fraud as to be void or voidable, the stock became the defendant's and the plaintiff ceased to be a stockholder, and whatever subsequent frauds upon stockholders there may have been, none of them were a fraud upon him. * * * The orator is supposed to know his rights. The defendant does not appear to have misrepresented or concealed any material fact relative to the corporate property or franchises. What was represented and withheld related to the pol-

icy of the management. The orator seems to have preferred to sell rather than risk the management promised; and he sold out. The course of the defendant may not have lain in the direction of the highest morality, and the whole scheme in which the orator and all were engaged may not; but this court is dealing with such rights as the law takes notice of, and not with purely moral questions. There is not enough shown as the bill is framed, to entitle the orator to rescind the contract and be restored to his stock."

VIII.

Even if the Shutting Down of the Mine was Fraudulent, the Fraud Did Not Render the Sale of the Stock Voidable.

The shutting down of the mine by Steinfeld, if he shut it down wrongfully, was a corporate wrong, which the corporation at its own instance or at the instance of any minority stockholder acting in its behalf, had the right to redress. No individual owning stock, simply by virtue of such ownership, had in his individual capacity, any remedy against any other individuals or set of individuals for a corporate wrong. It is the corporation which is injured, and not the individual, and while the law will permit the individual to put in motion the machinery to redress such wrong, it does it through the medium of what is known as a minority stockholder's action in which such individual seeks redress, not in his individ-

ual capacity, but as the champion of the corporation, and for its benefit.

In Smith v. Hurd, 12 Metcalf, 371, it was held that an action could not be maintained by a stockholder of a corporation against the directors, through whose reckless and improvident management of the corporate affairs the assets of the corporation had been wasted and lost, and the plaintiff's shares had become valueless, and this on the ground, as expressed by Shaw, C. J., that

> "There is no legal privity, relation or immediate connection between the holders of shares in a bank, in their individual capacity, on the one side, and the directors of the bank on the other. The directors are not the bailees, the factors, agents or trustees of such individual stockholders." (P. 384.)

Answering the argument that for every wrong there must be a remedy, the court says (p. 387):

> "But the true anwer to the objection is, that stockholders have a remedy, a theoretic one indeed and perhaps often inadequate, in the power of the corporation, in its corporate capacity, to obtain redress for injuries done to the common property, by the recovery of damages; and each individual stockholder has his remedy through the powers thus vested in the corporation, for the common benefit."

For misuse or mismanagement of the corporate property, by those in control of the corporation, the injury to the stockholder, in his individual capacity, is too remote to sustain any form of

action; his sole remedy is within and through the corporation.

It is true that in equity there is no wrong without a remedy.

But the principle laid down is not inconsistent with there being a proper remedy for Nielsen. Such remedy, however, under the principle and the authorities must be, as stated, the remedy of the corporation to redress a corporate wrong. If Steinfeld shut the mine down when the interests of the corporation required that its operations should continue, and did it for the purpose of injuring the corporation, and thereby depreciating Nielsen's stock, or, in other words, with fraudulent intent, that was a wrong, but not a wrong to Nielsen, but to the corporation, and the remedy rests with the corporation. If Nielsen had held his stock and done nothing, and Zeckendorf & Co. had sold out the corporation for its indebtedness, and the corporation had thereby been left without assets and Nielsen's stock rendered apparently valueless, there still would have remained a complete corporate remedy for the wrong, and Nielsen as a minority stockholder could have instituted an action in behalf of the corporation against Steinfeld; and upon proof that the shut down was fraudulent and was the proximate cause of the injury to the corporation, he would have recovered in such action for the benefit of the corporation, judgment against

Steinfeld, and the value of his stock would have been re-established thereby and the redress of the wrong consummated.

Nielsen was not bound to sell his stock either to Steinfeld or to anyone else. The acts of Steinfeld in no way impelled him to make the sale. His selling was a deliberate act and by selling, as stated by Judge Shaw, in the case of Smith v. Hurd, *supra,* he deliberately put out of his power the right to sue on behalf of the corporation to redress the wrong.

Therefore, in order that the appellees recover in this action, it was necessary, as stated in the opinion in Grant v. Atrill, *supra,* that they show some misrepresentation or concealment which induced them to part with their stock or some fraudulent act which was a direct wrong against them as individuals, and the court having found no misrepresentation which was alleged, and the relation between the parties being such that Steinfeld was under no obligation to make disclosures of his purpose to purchase the English group of mines, or of his opinion as to the value of the stock, the essential elements of fraud are lacking and the judgment cannot be sustained.

IX.

The Fact that Nielsen was in Financial Distress and that Steinfeld Knew it, Does Not Affect the Validity of the Sale of the Stock.

It is found by the court "that at the time the said Steinfeld was negotiating with the said Nielsen, the said Nielsen was in financial distress and without means, and this fact was known to the said Steinfeld at the time." [Fol. 79.]

And again, "That the said Nielsen was in financial distress, and was without means to resist the will and direction of the said Steinfeld, and the said Steinfeld knew of the pecuniary condition of the said Nielsen." [Folio 85.]

It is not found or claimed that Steinfeld was in any way responsible for Nielsen's lack of means.

It is not found that Nielsen's financial condition was the cause or one of the causes which brought about the sale, nor that he would not have sold his stock had his financial condition been otherwise. Indeed, it appears that so far from his yielding to the "will and direction" of Steinfeld because of his impoverished condition, it was only when satisfactory terms were offered him that he consented to make the sale. He had rejected a previous offer of Steinfeld, which was deemed unsatisfactory [Complaint folio 13], thus affirmatively showing that it was not the will and direction of Steinfeld to which he was compelled

to submit by reason of his lack of funds, but to the fact that an offer had been made which he considered under all the circumstances to his interest to accept. Whatever influence his financial condition may have had upon his own mind when he concluded to accept the last offer, it is apparent that his act was voluntary and not brought about by any coercion on the part of Steinfeld.

> "Whenever it appears that the parties knowingly and deliberately fixed upon any price, however great or however small, there is no occasion nor any reason for interference by courts, for owners have a right to sell property for what they please, and buyers have a right to pay what they please."
>
> Perry v. Pearson, 135 Ill. 218; 25 N. E. 636.

The language of Mr. Justice Clifford in French v. Shoemaker (14 Wall. 315, at p. 331), a case in many respects similar to this, in speaking of a like situation, is applicable:

> "Enough appears in the record to convince the court that the respondent was in straightened circumstances, that his business affairs had become complicated, that he was greatly embarrassed with litigations and that he was in pressing want of pecuniary means, but the court is wholly unable to see that the complainant is responsible for those circumstances or that he did any unlawful act to deprive the respondent of his property, or to create those necessities or embarrassments, or to compel him to do what he acknowledges he did do, which was to yield to the

pressure of the circumstances surrounding him, and as a choice of evils accepted the advance of five thousand dollars and the shares assigned him in the new organization as proposed, and voluntarily signed both the agreement and the assignment. Such an act as that of signing those instruments, under the circumstances disclosed in the record, must be regarded both in equity and at law, as a voluntary act, as it was unattended by any act of violence, or threat of any kind, calculated in any degree to intimidate the party or to force the result, or to compel that consent which is the essence of every valid contract."

X.

The Contract of June 29th was Valid.

This contract was signed by Steinfeld individually and by the Nielsen Mining and Smelting Company by J. N. Curtis as president. It was admitted that Curtis signed without authorization by the board of directors, but it is insisted that this in no wise affects the validity of the agreement so far as the appellant is concerned, for the reason that even if the contract were not binding upon the corporation, it was binding upon Steinfeld, and the appellant could have enforced its performance by him even though wholly unable to do so as against the Nielsen Mining and Smelting Company.

It is a long settled rule that where parties execute a joint contract and one of the parties can-

not be held liable for reasons which are personal to himself and do not release all the contracting parties, the other parties are still bound.

Hartness v. Thompson, 5 Johns, 160.

The contract having been fully executed long prior to the commencement of the action, want of mutuality, or want of authority on the part of Curtis cannot be urged.

9 Cyc. 333;

Wheeler etc. Co. v. Lyon, 71 Fed. 374.

XI.

There is No Such Statement of the Facts in the Nature of a Special Verdict as Will Enable this Court to Review the Judgment of the Supreme Court of the Territory.

On June 10th, 1909, there was filed in the office of the clerk of the Supreme Court of the Territory, a certificate of the Chief Justice of that court setting forth a statement of the facts, which was directed to be filed *nunc pro tunc* as of May 1st, 1909. In this statement the Chief Justice certified

"that the Supreme Court of the Territory of Arizona, having adjudged that the facts as found by the District Court in this cause did not sustain the conclusions of law or the judgment of the District Court, did, without passing in this court upon the correctness of the facts as found by the District Court, remand this cause to the District Court with directions to that court to enter judgment absolute for the defendants.

"And on behalf of the said Supreme Court of the Territory of Arizona I do hereby certify to the Supreme Court of the United States upon the appeal therein, that the following were the facts as found by the District Court upon which the said judgment of the Supreme Court of the Territory of Arizona was based." [Transcript of record, page 76, folio 170.]

Then follows a literal copy of the findings made by the District Court.

On November 12th, 1909, the court, sitting as such, ordered that all former statements of facts filed in this cause in this court be, and the same are hereby withdrawn, and a certificate of the Chief Justice in regard to statement of facts filed. [Transcript of record, page 91, folio 203.]

Pursuant to this order of the court, the Chief Justice filed the following certificate:

"I, Edward Kent, Chief Justice of the Supreme Court of the Territory of Arizona, do hereby certify that the Supreme Court of the Territory of Arizona, having adjudged that the facts as found by the District Court in this cause did not sustain the conclusions of law or the judgment of the District Court, did, without passing in this court upon the correctness of the facts as found by the District Court, remand the cause to the District Court with directions to that court to enter judgment absolute for the defendants, and therefore do not certify to the United States Supreme Court any statement of facts in the nature of a special verdict." [Transcript of record, page 91, folio 204.]

The effect of the order of Nov. 12th, 1909, was to undo whatever may have been done by the purported statement filed by the Chief Justice as of May 1st, 1909, and to leave the certificate filed by the Chief Justice pursuant to the order of the whole court as the only action taken with respect to the filing or certification of a statement of facts in the nature of a special verdict.

It has been settled by repeated decisions of this court that where a trial court decides a cause and makes special findings of fact, and the Supreme Court of a territory affirms the judgment or decree based upon such findings, the Supreme Court is deemed to have approved and adopted the findings made by the court of first instance, and such findings furnish a sufficient statement of the facts upon which to base an appeal to this court. These cases begin with Stringfellow v. Cain, 99 U. S. 610, and end, so far as the writer has been able to discover, with Eagle Mining Co. v. Hamilton, 218 U. S. 513.

The reason of this rule is obvious. The Supreme Court, determining that the facts as found by the *nisi prius* court are justified by the proofs, then determines from those findings that the lower court drew the correct conclusions. Under such circumstances it may well be said that the Supreme Court has approved the findings of the trial court and the conclusion drawn from such findings, and has thereby adopted such findings

as its own. In such a case a statement of facts made by the Supreme Court must, of necessity, be a mere repetition of the findings of the trial court, and this court does not sacrifice substance to form by requiring a statement from the Supreme Court of the Territory, other than the findings of the trial court, with the necessary inference of their approval by the Supreme Court.

Under such circumstances, the findings, made by one court, and held to be justified by the other, furnish a sufficient basis upon which this court may act, and, if it differ with the courts below, direct such judgment as the facts so found may require.

So also in a case where the Supreme Court of a Territory approved the findings of fact made by the trial court as warranted by the evidence, but held that the conclusions drawn from the facts found were erroneous, the same rule might with propriety be applied. The language found in Stringfellow v. Cain, 99 U. S., at page 614, that "the same will be true if there is a reversal for the reason that the facts as found are not sufficient to support the judgment," though *obiter dicta*, are doubtless correct in a proper case.

But the whole basis of the rule that the findings made by the trial court furnish the statement of facts required by the statute is that such findings are either in terms or by necessary implication approved by the Supreme Court of the

Territory. The tacit approval of such findings or the silence of the Supreme Court with respect to them raises a presumption that the Supreme Court did, in fact, approve and hold justified the findings upon which its action was based.

It is equally well settled that, where the Supreme Court does not, in fact, approve the findings of the trial court, such findings are not a sufficient statement of facts and do not furnish a basis of review in this court.

Gray v. Howe, 108 U. S. 12.

The conclusion to be drawn from these authorities is that the basis of the rule that the findings of the trial court are to be taken as the findings of the Supreme Court and hence answer the purpose of the statement of facts required by the act of Congress is the actual or presumed approval of such findings by the Supreme Court. Hence, when the record shows that the Supreme Court expressly refused to approve such findings, the reason of the rule falls and the rule falls with it.

It is apparent, from the record in this case, that the Supreme Court of Arizona, did not intend to, and did not, in fact, adopt or approve the findings made by the District Court; that the correctness of the findings, or whether the evidence justified them, was seriously called in question, and that the court, not deeming it necessary to

pass upon that point in deciding the case, declined to approve or adopt the findings, but contented itself with holding that upon their face they did not justify the conclusion drawn by the trial court.

Whatever effect might have been given to the certificate of May 1st, 1909, filed by the chief justice, this certificate together with the statement following it, was absolutely withdrawn by the court itself, and pursuant to its direction, the chief justice filed a certificate, in behalf of the court, declining to make any statement of facts in the nature of a special verdict at all.

It is thus conclusively shown that the court did not, in fact adopt or approve the findings of the trial court, but expressly declined to adopt or approve them.

The condition of the case in the Supreme Court of the territory is apparent. It is obvious that the findings were attacked as incorrect or not justified by the evidence (a matter which that court had power to review), and also upon the ground that they were insufficient to justify the conclusion of the District Court or the judgment which it had rendered. The Supreme Court deemed the latter point well taken. It felt, therefore, that it was unnecessary to go further, as the view which it took of the effect of the findings, as made, ended the case. It, therefore, reversed the judgment without determining the other ques-

tions raised. It appreciated, however, that if it remained silent upon the question of the statutory statement of facts, it would be presumed in this court under the rule of Stringfellow v. Cain that the findings of the District Court had been approved, and that thereby a grave injustice might result to the defendants in the event that this court should differ with the Supreme Court of Arizona and deem the findings of the District Court sufficient to support the judgment of that court. For in such event this court would without doubt render judgment absolute for the plaintiff upon facts possibly without a shred of evidence to support them, and without opportunity to the defendants to have the question as to the sufficiency of the evidence passed upon by the Supreme Court of the territory. Therefore, and in order to avert such possible injustice, it ordered withdrawn the perhaps ambiguous statement made by the chief justice, and ordered filed in its stead its unequivocal refusal to adopt the findings of the District Court or to make any statement at all.

The doctrine of Stringfellow v. Cain and cases following it has, therefore, no application, and the case stands without any statement of facts in the nature of a special verdict. In consequence, in the absence of such a statement of facts, this court can do nothing but affirm the judgment.

Armijo v. Armijo, 181 U. S. 558.

For these reasons it is respectfully submitted that the judgment of the Supreme Court of the territory of Arizona should be affirmed.

In no event should the judgment of the District Court be affirmed, or the cause remanded with directions to affirm that judgment. If this court should reach a different conclusion as to the effect of the findings from that arrived at by the Supreme Court of the territory, and therefore hold that the judgment should be reversed, the cause should be remanded to the Supreme Court of the territory, or of the state of Arizona, in order that the questions not passed upon may be determined.

Dated Tucson, Arizona, January 17th, 1912.

EUGENE S. IVES,

Attorney for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 218.

MARY NIELSEN, ADMINISTRATRIX OF THE ESTATE OF CARL S. NIELSEN, DECEASED, AND MARY NIELSON IN HER OWN PERSONAL RIGHT, APPELLANTS,

vs.

ALBERT STEINFELD AND THE NIELSEN MINING AND SMELTING COMPANY, NOW KNOWN AS AND CALLED THE SILVER BELL COPPER COMPANY, APPELLEES.

SUPPLEMENTAL AND REPLY BRIEF.

False Representations.

At page 13 of our opening brief we state, "the allegation and finding that Steinfeld caused Nielsen to believe he was legally discharged, when he had not been, does not seem to us to have any force whatever," and at page 15 we state that we believe "no alleged misrepresentation by Steinfeld except

that with respect to the discharge of Nielsen as superintendent (which we deem inconsequential) was both alleged and found;" and, again, at page 18, we state that "none of the allegations of the complaint as to misrepresentations (except as to the discharge of Nielsen) are found."

These excerpts from our brief are substantially an admission that the court found to be true the allegation in the complaint that Steinfeld falsely represented that Nielsen had been discharged as superintendent by the board of directors.

We ascertain upon a more careful investigation of the findings that we were too liberal in making such an admission. The court made no such finding.

What the court did find is that *Curtis and Shelton* caused the false entry to be made upon the minute book of the corporation (Page 32, folio 76). But there is no finding that Steinfeld either directed such false entry or knew of it either before or after it was made, or caused its purport to be communicated to Nielsen, or that Nielsen ever saw or heard of such false entry except by inference from the finding that Nielsen believed himself to have been legally discharged.

Counsel for appellant appear to have been equally careless; otherwise they would not have stated as they did, at page 39 in their brief that Steinfeld "had the books of the corporation deliberately falsified;" or as they did at page 25 that "he has his directors falsify the records of the company in order to deceive Nielsen."

It cannot be contended that the general finding that Steinfeld dominated the corporation and its directors could be extended to make Steinfeld responsible for any false entries which such directors might make upon the books of the company.

Referring to the question of false representation at pages 14 to 19 of our opening brief, we now assert with confidence that without exception or qualification no claim of misrepresentation by Steinfeld is both alleged in the complaint and found by the court to be true; that none of those which are

alleged is found to be true, and that none of those which were found by the court is alleged in the complaint.

Counsel for appellant make an elaborate effort in their reply brief to meet this, as we deem, fundamental contention of ours, that the findings on the subject of false representation are not responsive to any allegations of the complaint.

Calling attention to the admission in our brief at page 15, heretofore quoted, to the effect that the only misrepresentation both alleged and found, is with respect to the discharge of Nielsen as superintendent, counsel say: "It is here admitted by appellees that there was one representation which was false and made with intent to deceive. It was found that it did deceive and was relied on in the sale of the stock."

As hereinbefore stated there is no finding that Steinfeld made any such representation, and the admission in our brief to that effect was unauthorized.

But even if it should be held that the false entry made by Curtis and Shelton could be imputed to Steinfeld, we repeat, how could that have been of any consequence?

Steinfeld undertook to discharge Nielsen, and Nielsen refused to be discharged, and as a matter of fact remained as superintendent until the 19th of February, when the mine was closed down. His term of appointment had expired on the 14th of January, 1900 (Finding IV, fol. 68). He was affirmatively discharged by a legal vote of the board of directors on the 10th of March, three and one-half months prior to the execution of the contract.

The directors had the power to discharge him at any time whenever they chanced to get together, and if both of them were under the dominion of Steinfeld, which is essential to the imputation to Steinfeld of their false entry, then Steinfeld could have had Nielsen discharged at will, and Nielsen so knew.

It is forcibly alleged in the complaint that by reason of Steinfeld's domination of the corporation and a majority of its stockholders and directors "Nielsen was powerless to re-

sist when Steinfeld ordered said mine and smelter shut down as aforesaid, and forced said Neilsen out of his position as such superintendent" (page 10, folio 26).

How absurd then to argue that the false entry of a fact which had long since become true, and which at any time could have been made true, had material bearing upon Nielsen's execution of the agreement which it is sought to set aside?

As a result of a desperate search through their voluminous complaint for some allegation of a false representation by Steinfeld, counsel quote on page 9 of their reply brief from the amended complaint at page 9 of the record, to the effect that Steinfeld conceived and put into execution the design to acquire Nielsen's stock, and that in order to accomplish such design, he shut down the mine and smelter, and caused Nielsen to be discharged, and falsely represented to Nielsen that the indebtedness of the corporation to the firm of Zeckendorf & Co., amounted to from $75,000 to $85,000.

They argue that this allegation of Steinfeld's act shutting down the mine was a false representation by act.

We agree with counsel that a false representation may be made by act as well as by word of mouth; but we do not agree with them that the mere allegation that Steinfeld shut down the mine for the purpose of getting rid of Nielsen, was equivalent to an allegation that he shut down the mine for the purpose of deceiving Nielsen.

If it had been alleged that he shut down the mine for the purpose of deceiving Nielsen, and did thereby deceive him and that influenced by such deceit Nielsen sold the stock, the allegation would have sufficed; and the proof that he shut the mine down would have been evidence tending to establish that the act of shutting the mine constituted a misrepresentation. But the absence of an allegation that Steinfeld shut it down for the purpose of deceiving Nielsen, and that he did deceive him by shutting it down, is fatal

to the contention that the words quoted amount to an allegation of false representation.

The shutting down of the mine for the purpose of preventing the corporation from obtaining money wherewith to pay its debts, and thereby placing it at the mercy of Steinfeld, might, as stated in our opening brief at pages 22 to 25, be acts sufficient under certain conditions, not however existing in this case, to constitute actionable fraud, and the allegations in the complaint as to the fact of shutting down the mine were doubtless intended as the foundation for some such contention, but they cannot be enlarged into allegations of misrepresentations.

That portion of the finding appearing at page 33 of the record and quoted on page 10 of the reply brief, does nothing more than set forth Steinfeld's true reason for shutting down the mine, thus establishing the fact that the representation which he made in his letter of January 3, 1900, as his reasons for shutting down the mine were false.

The false representation consisted not in the fact of shutting down the mine in order to get rid of Nielsen, but in the fact that he told Nielsen he was shutting down the mine for an entirely different purpose, and, as has been heretofore so frequently stated, such misrepresentation was not alleged in the complaint.

Counsel endeavor again to find an allegation of false representation at pages 4 and 5 of the record, quoted at page 11 of their reply brief, which is to the effect that Steinfeld kept representing to Nielsen *"through Curtis* that said corporation was getting deeper and deeper into debt to said firm of L. Zeckendorf & Co."

Our reply to such suggestion is two fold:

In the first place, there is no finding that Steinfeld made representation to Nielsen through Curtis at any time whatever; and in the second place, the affirmative finding of the court that Steinfeld made no misrepresentation as to the amount of the indebtednes to L. Zeckendorf & Co., should certainly be construed to negative the proposition that he

falsely represented that the company was getting deeper and deeper into debt. Such representations, if made, would have been representations as to the amount of indebtedness.

Furthermore, the court found:

> "The said Carl S. Nielsen and Mary Nielsen had, at all times, the means of ascertaining the amount of the indebtedness of said corporation to L. Zeckendorf & Co., and could with reasonable effort, have ascertained the same; *and in all the transactions herein set forth, neither the said Carl S. Nielsen nor Mary Nielsen relied on any such representations.*" (Page 37, folio 86.)

The fact that they had the means of ascertaining the amount of the indebtedness would nullify the effect of any representation which Steinfeld might have made that the company was getting deeper and deeper into debt; but the final words, "any *such* representations," are conclusive.

Statute of Limitations.

We deem it proper to call to the attention of the court the fact that chapter 16, Laws of Arizona 1903, which provide that an action for relief on the ground of fraud or mistake, should be commenced within one year after the cause of action should have accrued, was passed after the cause of action set forth in the complaint accrued, and also after the death of the plaintiff's intestate.

We had inadvertently overlooked this in the preparation of our opening brief, and attention does not seem to have been called to it in either of the briefs of counsel for the appellant. We do not, however, deem it material.

Prior to the enactment of such statute, there was no limit prescribed by the Arizona statute for actions founded upon fraud or mistake.

It was provided by paragraph 2950 of the Revised Statutes of 1901 that "actions for detaining the personal property of another, and for converting such personal property

to one's own use," must be commenced within two years after the cause of action should have accrued.

If the effect of the statute of 1903 was, as we believe it to be, the law to extend the time of the plaintiff to commence her action until one year after the enactment, then the argument in our opening brief is applicable, for the only allegation in the complaint as to the plaintiff, Mary Nielsen's, failure to discover the alleged frauds is the same as the allegation with respect to Carl Nielsen's lack of such knowledge, and appears at page 11, folio 29, of the complaint.

We argued in our opening brief that a reply cannot be of avail to fortify a weak complaint; but even the reply is insufficient to cover this defect. The only allegation upon the subject in the reply is that at the time Mrs. Nielsen signed the release (which was within one year before the commencement of the action) "she did not know that the said contract of June 29, 1900, had been obtained from herself and the said Nielsen by means of false statements and representations, as set out in plaintiffs' third amended complaint" (page 25, folio 60).

Inasmuch as all the statements and representations alleged in said amended complaint to have been false were found by the court not to have been made, this allegation, even if deemed a part of the complaint, adds nothing to it.

We therefore find the complaint upon this vital subject insufficient as to both Nielsen and Mrs. Nielsen.

If, on the other hand, it be deemed that the statute as it existed prior to 1903 should control, then the cause of action is clearly barred.

Under paragraph 2965 of the Revised Statutes of 1901, the statute of limitations was suspended for 12 months because of Nielsen's death. Prior to the act of 1903 there was not any statute in Arizona with respect to actions founded upon fraud, and therefore this action plainly came within paragraph 2950, above quoted, as an action for detaining the personal property of another.

The Supreme Court of California held, in a very well-con-

sidered case, that an action to set aside a conveyance for fraud was to be considered so far as the effect of the statute of limitations was concerned, as an action for the recovery of real property.

Murphy *vs.* Crowley, 140 Cal., 141; 73 Pac., 820.

The contract having been executed on the 29th of June, 1900, and coming within this two-year provision, and allowing for the additional year on account of Nielsen's death, the cause of action complained of would have been barred on the 29th of June, 1903, unless, as heretofore stated, extended by the amendment of 1903, in which event, as heretofore discussed, it is likewise barred.

We do not favor the defense of the statute of limitations, especially in a case of this character. It is not needed with respect to any of the allegations of the complaint. Those allegations were made upon the trial and disproved.

If the facts found by the court and not alleged in the complaint be deemed, as claimed by counsel for the appellant, even though not alleged, sufficient to support the judgment, then, without reluctance, we avail ourselves of the statute of limitations as against them; for not having been an issue upon the trial, no effort was made by the defendants to disprove them.

Steinfeld's Control of the Corporation.

Counsel for appellants dwell upon Steinfeld's dominion and control of the corporation and assert that Curtis and Shelton were "subservient directors." (Appellants' reply brief, page 8.)

The court finds that Shelton was but the representative of the firm of L. Zeckendorf & Co. upon the board of directors, "and was dominated and controlled by" Steinfeld (page 30, folio 70). With respect to Curtis, the court finds that the "said Curtis was largely influenced in his actions as a director of the said corporation by the said Steinfeld." (*Idem.*)

This finding does not sustain the allegation that the board of directors, of whom Nielsen was the third, were under the dominion and control of Steinfeld.

The Contract of June 29, 1900.

On page 21 of their main brief counsel for the appellant argue that the Nielsen Mining and Smelting Company was not and could not be bound by the contract made between the Nielsens on the one part and such corporation and Steinfeld on the other. This may be true, because it does not appear that the contract was authorized by the board of directors. But Steinfeld was bound by it. It was his individual obligation to pay the $10,000 as soon as the corporation consummated a sale of its mining properties.

It is argued, on page 21 of counsel's opening brief, that by reason of the language employed there was no obligation on Steinfeld's part. To us this contention seems entirely without merit. Whether a sale of the properties were made by the deliberate act of the corporation or in its behalf at a forced sale by a creditor, upon the consummation of the sale, Nielsen's cause of action against Steinfeld for the $10,000 would have accrued.

Mrs. Nielsen's Receipt of $10,000 and Release to Steinfeld

It is found by the court (findings 11 and 13) that at the time Mrs. Nielsen received the $10,000 from Steinfeld she did not know the amount of the purchase price, or that a dividend of $111 per share had been declared upon the 300 shares of stock.

As has been heretofore suggested, the facts so found are not alleged in the complaint. Furthermore, it is alleged in the complaint that Mrs. Nielsen made repeated demands of Steinfeld for such $10,000. Inasmuch as under the terms of the contract the $10,000 was not due her until after a

sale of the properties, it follows (although there is no finding upon the subject one way or the other) that she must have known of the sale, and while it is found that Steinfeld did not inform her of the purchase price, if she knew of the sale, she certainly was put upon inquiry as to its terms. There is no allegation or finding that Steinfeld refused to give her any information which she asked or gave her any misinformation.

The statement on page 24 of the brief that Steinfeld concealed the price from Mrs. Nielsen is altogether unwarranted.

The Law is Correctly Stated in the Opinion of the Supreme Court of Arizona.

Nielsen was an officer and director of the company, and it was expressly found by the court that at the time of the closing down of the smelter he knew the condition of the mine. (Finding VIII, folio 78.) The language in the opinion to which counsel take such exception on page 26 of their brief is, that Nielsen, as director, was "presumptively informed of the condition of the mine, of its value and future prospects, and of the condition of its affairs."

It seems to us that in view of the direct finding that he did know the condition of the mine, there was no necessity for any presumption at all.

While it is found, although not alleged, that Nielsen did not know that Steinfeld's purpose in shutting down the mine was to buy the English group of mines, there is no finding that Nielsen did not know that Steinfeld was negotiating for the English group.

It is alleged in the complaint that Steinfeld purchased the titles to the mines known as the English group of mines from "various persons." The Francis and Volkert titles were purchased by him on the 15th of May, six weeks before he bought Nielsen's stock.

At page 35 counsel again treat the opinion of the Supreme Court with manifest unfairness. The Supreme Court states

that while it was found that Steinfeld did not disclose to Nielsen the fact that he intended and expected that the company would acquire the English group of mines, it was not found that Nielsen did not know that Steinfeld so intended and expected. This portion of the opinion is in strict accord with the findings.

The finding at page 36 of the record quoted at page 35 of counsel's brief, is not that Nielsen did not know that Steinfeld intended to purchase the English group of mines, but that Nielsen did not know that Steinfeld shut down the mine for the purpose of acquiring such mines.

There is no Finding that Steinfeld Intended to Acquire Nielsen's Stock at an Unfair Price.

It is alleged in the complaint that Steinfeld was animated by the purpose to acquire the Nielsen stock for a "mere pittance."

At page 11 of our opening brief, in the statement of facts we use the words: "It is so found by the court," referring to an allegation with respect to the English group of mines, but in such connection as to make it appear that we admit that the allegation that he shut down the mines to acquire the stock at a mere pittance of its actual value was also found.

There is no finding to that effect, and we trust that our ambiguous language will not lead the court into a misapprehension.

The statements at page 6 and other places in appellant's reply brief that Steinfeld closed down the smelter "in order to obtain Nielsen's stock at an unfair price" are not justified.

Letter of January 3, 1900.

Although not responsive to any allegation in the complaint it was this letter upon which the district court based its findings and judgment. The language chiefly complained of is this: "In view of the very large indebtedness existing

against the company, and the fact that little headway is being made toward its liquidation."

How can this sustain the charge of a false representation? The company *was* very largely indebted to L. Zeckendorf & Co. The word "little" is a matter of opinion. The court finds that the indebtedness was being materially reduced. What to one man may seem but little headway in the payment of his debts may to another seem a material reduction of them. Furthermore and despite the allegations to the contrary, on page 14 of appellant's reply brief the court did not find that Nielsen in signing the contract either acted or relied upon the representation that the company was largely indebted to L. Zeckendorf & Co. or that little headway was being made toward the liquidation of such indebtedness.

All of which is respectfully submitted.

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